Supreme Court, U.S.
FILED
01-431 SEP 10 2001
OFFICE OF THE CLERK

No. 01-

IN THE

SUPREME COURT OF THE UNITED STATES

DALE M., by his mother and next friend, ALICE M.

Petitioners,

v.

BOARD OF EDUCATION OF BRADLEY-BOURBONNAIS HIGH SCHOOL DISTRICT NO. 307, JERRY SIKES, WILLARD DEWITT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER OR NOT RESIDENTIAL PLACEMENT UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT ("IDEA") IS APPROPRIATE WHEN THE DISABILITY IS EMOTIONAL AND NOT COGNITIVE IN NATURE?

PARTIES

Petitioners:

DALE M., by his mother and next friend, ALICE M.

Respondents:

BOARD OF EDUCATION OF BRADLEY-BOURBONNAIS HIGH SCHOOL DISTRICT NO. 307, JERRY SIKES, WILLIARD DEWITT, JOAN PIERCE, MICHAEL DOWNEY, STEVE HLAVACH, GWEN HOPKINS, RICHARD MANN, DONALD TURNER, and CHARLES PARSONS, JR.

There are no parent companies or non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Dale M. and Alice M. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeals for the Seventh Circuit are dated April 11, 2001 (Appendix A) and January 12, 2001 (Appendix B). The District Court opinion from the Central District of Illinois is dated June 15, 1998 (Appendix C)[1]. The unpublished administrative decisions are dated July 25, 1996 (Appendix D) and March 24, 1996 (Appendix E).

JURISDICTIONAL STATEMENT

The order denying the petition for rehearing and petition for rehearing *en banc* was entered on April 11, 2001. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §1331, arising under the Individuals With Disabilities Education Act, 20 U.S.C. §1400 *et seq*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(l). Petitioners were granted until September 8, 2001 to file their Petition for Certiorari. This Petition for Certiorari is timely filed on September 10, 2001.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

(See Appendix at Appendix F)

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1 The District Court issued a multitude of post-judgment orders, including orders enforcing the judgment, which were not appealed by the Defendants and, thus, not before the Court of Appeals. Plaintiffs appealed the amount of attorney's fees awarded, but this issue was not addressed by the Court of Appeals.

STATEMENT OF THE CASE

INTRODUCTION

This is a special education case brought by Petitioners, parent Alice M. and student Dale M. under The Individuals With Disabilities Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"), seeking to reverse a court of appeals decision and reinstate a district court order and state-appointed hearing officer's decision finding that Dale M. is entitled to residential placement because of his serious emotional disabilities. The Seventh Court of Appeals ruled that schools do not have to provide residential placement to emotionally disturbed children because they do not have cognitive disabilities.

A. EDUCATIONAL HISTORY

Dale M. has a history of school problems for which his mother, Alice M., sought assistance since at least 1988, long before he had any problems outside the classroom.

Since 1993, the School District recognized that Dale had the following educational problems: significant deficits in reading comprehension and written expression; chronic processing deficits across all settings, in the areas of attention, memory, and organization; difficulty concentrating and staying on task; related attendance problems; emotional problems--giving up, not knowing why he is not doing well, his sitting for long periods of time without doing anything.

The School District IEPs noted that Dale "cannot attend to academic tasks", has processing deficits in the area of attention, memory, and organization that are "chronic, intrinsic, across all settings", requires special education intervention for his related attendance problems, that his "behavior seriously

affects ability to perform", "cannot attend", the severity of his disabilities is "highly intense, [and] prohibits performance".

The School District knew as early as 1993 that Dale's attendance was inexorably intertwined with and a manifestation of his disabilities. The School District had tried counseling before and the School District's own staff testified that it was ineffective.

The School District correctly determined that Dale's school attendance problems were due to his disabilities and that a Behavior Management Plan was necessary.

The District's own psychologist noted the following about Dale M. in January 1996:

- depression
- unhappiness, themes of violence, tragedy and loss
- inappropriate affect with tragic narratives
- negative outlook on life and sense of hopelessness concerning successful outcomes along with inability to cope in ways that harbor success

For the 1994-95 school year,. The District wrote an IEP on August 17, 1994 for LD resource, with no goals, no related services, and only one objective: "Dale will keep an assignment notebook". On September 23, 1994, as attendance problems continued, the School District convened a new staffing and, without evaluating Dale, changed his primary disability from Learning Disabled to Behavior Disordered. Dale's guidance counselor at the School District recommended residential placement for Dale, but the School District's Director of Special Education rejected this recommendation out of hand. A series of suspensions, exclusions, and changes of placement followed.

Dale deteriorated significantly, often being too depressed to get out of bed or to perform even minimal self-help skills. The school social worker testified that in 1995 when he was in the Co-Op program, Dale "just sat in" and was unable to talk about his feelings. Alice M. sought help from the District, without success. Dale attended the Co-op program only 20 days from September 1994-January 10, 1995. On January 10, 1995, Dale was hospitalized for on-going school problems, for previous suicidal thoughts, and for problems with authority. By this time, Dale's diagnosis was major depression disorder, attention deficit disorder, substance abuse with tetra hydrocortisone, and aggressive passive dependence personality.

Dale's attendance problems were not addressed by the School District which instead excluded him, and next placed him on homebound with no related services, and repeatedly developed IEPs with goals of excluding him from school. At the time the dispute arose in January 1996, Dale's school district placement for most of the proceeding year was homebound with no related services. As an 11th grader in the District programs, Dale had failed most subjects, earned almost no credits and ranked at the bottom of the school.

In September 1995, the District convened a staffing to consider a homebound IEP. Dale was now moved on to the 11th grade; the District recommended a total of five (5) hours of Homebound tutoring per week for Dale and dropped all related services.

In November 1995, while on homebound tutoring, Dale went into a friend's house and stole his friend's Nintendo. Because of two prior charges and juvenile probation, Dale was placed in detention. On December 11, 1995, Dr. Lam, Dale's psychiatrist, concluded that Dale "is a youth with significant problems of depression, self-regulation and self-discipline" and recommended long-term residential placement. Dr. Lam noted

Dale's diagnosis of Recurrent Major Depression Disorder, Attention Deficit Hyperactivity Disorder, (ADHD), Marijuana abuse, Oppositional Defiant Disorder, Conduct Disorder and Learning Disability.

On December 21, 1995, the Juvenile Court ordered a psychological assessment by Erwin J. Baukus, Ph.D. Dr. Baukus noted the failures of all less restrictive efforts at intervention, including the various special education programs of the School District, parental encouragement, arrest, probation and counseling.

Dr. Baukus specifically recommended a residential school.

On December 29, 1995 parent provided the District the Lam and Baukus' reports.

On January 5, 1996, the parent filed a due process hearing request. At that time, the District's program for Dale was for 5 hours of homebound a week with no related services. On January 17, 1997, the District convened a conference, identified Dale as behavior disordered, rejected the recommendations for residential placement made by Dr. Lam and Dr. Baukus, and again recommended the same part-time Co-op program that had been unsuccessful the prior school year, with exactly the same IEP plan for exclusion of Dale from school for the behavior problems which were part of his disability. Alice M. disagreed with the School District and filed for Hearing. The Juvenile Judge released Dale from detention and placed him on probation[2].

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2 The Level II Review Officer characterized Dale's release from detention as: "It should be noted that the Parent withdrew DM from jail, ...", as though parents control the admission and withdrawal of students from juvenile detention. Dale was never sentenced to jail for any offense, including the 1995 offense of taking his friend's Nintendo.

The School District considered Dale M.'s truancy to be related to his educational progress until the need for a residential placement became an issue. At that point, the District took the position that it was no longer obligated to address this educational need.

In January 1996, Dale's mother unilaterally placed Dale at Elan School, a ISBE-approved residential special education program. Dale's academic performance at Elan School showed consistent improvement. In addition, he has had 100% attendance, and has learned new successful patterns of behavior while remaining engaged in the educational process, in sharp contrast to the system of exclusion that was used by the School District.

Elan School continued to provide Dale an appropriate special education until he graduated in 1999, a date after the submission of all the summary judgment pleadings in the District Court[3]. Dale's attendance at Elan School was perfect, his grades consistent, and his behavior improved considerably. He has had no suspensions or exclusions.

Dale's Educational Progress Reports from his individual teachers at Elan rated his homework quality in each class and he succeeded in all courses at Elan School. Dale earned virtually all of his credits from 1996-1999 at Elan School after two and a half years of failure in High School at the School District.

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3 When the District Court judge entered his ruling on June 15, 1998 on summary judgment, the record did not contain any mention of Dale's graduation; thus, the District Court's decision did not mention his graduation, a fact that was provided to the Court much later.

B. THE LEVEL I DUE PROCESS HEARING BY STATE-APPOINTED HEARING OFFICER NIDETZ

The Hearing Officer applied the two-prong test established by this Court in *School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1995):

(1) is the school district's proposed IEP/placement appropriate, and, if not?
(2) is the parents' unilateral placement appropriate, does it confer educational benefit?

The School District's proposed IEP excludes Dale from school: (1) to sit facing class for 5 minutes; (2) to sit away from class and write a consequence paper for 10 minutes; (3) to leave class and write a consequence paper for 15 minutes; (4) to leave class and go to the time-out room for 20 minutes; (5) to be excluded and go home for the remainder of the school day and the following school day for the very behaviors that were part of Dale's disabilities at the time; and (6) to go with the sheriff and/or to the hospital emergency room for his disabilities. The goal for Dale was to exclude him 80% of the time.

Hearing Officer Nidetz found in a well reasoned decision, supported by overwhelming evidence and testimony, that

> The question of appropriate educational setting was in dispute and central to this hearing. the School District's insistence that their Kankakee Co-Op Day Program, operating from about the hours of 8:00 a.m. to 1:00 p.m., with a Behavior Management Program using Time Outs of 1-5 increasing severity level, would certainly have the ultimate effect of excluding D.M. from school

and thereby denying him of a FAPE. We furthermore have the actual experience of a previous period from September to January/February (virtually an entire semester) resulting in only 20 days of attendance, albeit with good behaviors for 19 of them, but earning no credits. The student himself has flatly stated he would not return to school there. We also have evidence that his stay in the juvenile detention center, for the period of 11/7/95 to 1/12/96, produced some problematic behaviors; making it clear that an open setting, like the Day Program could not contain him.

This Hearing Officer is of the opinion that the preponderance of the written evidence and oral testimony makes clear that the unilateral placement of D.M. by his parent in a structured, ISBE approved, private residential school facility is an appropriate educational placement, in the LRE, directly related to the student's needs; and as such is the financial responsibility of the School District.

The Supreme Court has ruled that the parent does not have to go along with what they consider a detrimental school placement, and have the right to unilaterally withdraw a student from what they believe is an inappropriate setting. The two pronged test in the case of "School Committee of the Town of Burlington vs. Department of Education, 105 S.Ct. 1996 (1985)" is a) that the School District's (proposed) placement in the Kankakee Co-Op Day Program is inappropriate, and b) that the unilateral placement at Elan is appropriate. The parent has met both these tests.

The School District's argument that Elan is just another form of incarceration or medical or non-educational and therefore not their responsibility is rejected by this

Hearing Officer.

(App. E, 58a, 59a).

Hearing Officer Nidetz ruled that the School District's Day Program was inadequate to serve the needs of this severely behavior disordered and substance and alcohol involved student; that the private Illinois State Board of Education approved residential special education school was an appropriate placement, and that Alice M. acted appropriately in making this residential placement, and that the School District was financially responsible for the placement. (App. E, 59a).

Nidetz also noted that the description of suicidality (whether thought, gesture or manipulative) had implications for placement in an open setting, a factor the School District refused even to consider. (App. E, 58a).

C. THE STATE-APPOINTED LEVEL II REVIEW CONVENED BY REVIEW OFFICER MEDOW.

The state-appointed Review Officer never addressed the School District's IEP, with its goal of excluding Dale from school 80% of the time. He did correctly conclude that Dale M. has demonstrated a lack of insight, noted Dale M.'s restrictions for misconduct while in juvenile detention, that Dale was placed on suicide watch on three different occasions, and that Dale failed to display a consistent ability to function appropriately in a secure detention.

However, he reversed State-appointed officer Nidetz, finding that, although Dale's substance abuse impedes the ability of the School District to educate Dale M., parent had to prove that Dale's substance abuse was attributable to the School District. Thus, the District's IEP was never examined and the two-prong *Burlington* test was never applied by Medow. He

concluded that there was no educational need for the residential school placement because Dale did not have impaired intellectual capacity to process educational material; he was not cognitively disabled. Even though the evidence overwhelmingly established that Dale was earning good grades academically at Elan School, he found the Elan School did not benefit Dale and concluded the residential placement at the ISBE-approved special education school was not necessary or appropriate for educational reasons. (App. D).

D. THE DISTRICT COURT PROCEEDINGS

Additional evidence was presented at the District Court regarding Elan School, including the Illinois State Board of Education's ("ISBE") approval of Elan School and reimbursement rate, ISBE-approved calendar, length of school year and school day, ISBE-approved Program and Curriculum, as well as Dale M.'s Elan School Transcript, Grades and Progress reports to January 1998.

The District Court examined the additional evidence and concluded:

> This Court finds that a preponderance of the evidence shows that Elan is an appropriate placement for Dale. While it is true that Dale was uncooperative during the initial months of his placement at Elan, the expert testimony indicated that an adjustment period is ordinarily required for new students. Moreover, Dale's academic performance was good from the very beginning at Elan (emphasis in original). Indeed, the evidence presented shows that throughout Dale's stay at Elan, he has received excellent grades and reports in all of his classes. Dale is receiving an educational benefit from Elan (emphasis added). ...

> Moreover, Dale's *academic* performance was good from the very beginning at Elan. Indeed, the evidence presented shows that throughout Dale's stay at Elan, he has received excellent grades and reports in all of his classes. Finally, his attendance has been perfect (emphasis added). It is therefore undisputed that academically, Dale is receiving an educational benefit from Elan.

(App. C, 26a, 27a).

The District Court applied the *Burlington* standard, analyzed the School District's IEP and found it deficient, especially in light of the District's failure to modify the same IEP when the same IEP was ineffective the year before. The IEP did not effectively address Dale's attendance problems which the District identified as part of his disabling condition.

The District Court determined that the proposed January 17, 1996 placement was inappropriate because "(1) the District's IEP did not effectively address Dale's attendance problems; and (2) the District's IEP had previously been shown to be inappropriate through Dale's lack of attendance." (App. C, 26a). As the District Court emphasized, Dale's conduct is:

> "central to a proper determination of an appropriate placement. Dale's handicap is a *conduct* disorder. The very reason he is covered by the IDEA is because of his inability to manage his conduct. Consequently, the District's failure to address how his disability impacted his conduct regarding attendance resulted in a deficiency in their IEP."

(App. C, 25a).

On the residential placement issue, an issue of law to be

reviewed *de novo*, the District Court reversed the Medow opinion and ordered retroactive reimbursement for Dale's residential placement at Elan School and awarded Alice M. attorney's fees and costs as a prevailing party[4].

E. PROCEEDINGS BEFORE THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT: THE MAJORITY AND THE DISSENT

The Seventh Circuit issued it Opinion on January 12, 2001 reversing the District Court, with dissent (App. B). The majority created a new definition of when a residential placement is permissible that is at odds with other circuits and substituted its own view of educational policy for that of the professional educators as to Dale M.'s needs and the merits of the ISBE-approved Elan School.

The majority below held that the ISBE-approved school was not within the ambit of the IDEA as a matter of law, that it was a "jail substitute", that Dale was not entitled to residential placement because, although he was emotionally disturbed, he did not have a diminished IQ or have learning disabilities, that his identified disabilities are not "primarily educational" and that "confinement" was all the ISBE-approved school provided Dale[5]. The Court below said that Dale's disabilities are not "primarily educational" because:

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4 Dale M. had raised §504 and §1983 claims, on which discovery was stayed pending resolution of the IDEA claim. Dale M. appealed this ruling, which appeal decision was not addressed by the court of appeals.

5 Dale was on probation for the youthful indiscretions of (1) trespassing; (2) joy riding with another student who was driving a relative's car; (3) taking a friend's Nintendo. He was in juvenile detention while being evaluated. He was never sentenced to jail nor could a parent "withdraw" a person from jail. The majority seems to advocate that parents should not pick students up from detention and that parents and society favor jail as a substitute for educational services under the IDEA.

> [H]e has the intelligence to perform well as a student and no cognitive defect or disorder such as dyslexia that prevents him from applying his intelligence to the acquisition of an education, without special assistance. His problem is a lack of proper socialization, as a result of which, despite his tender age, he has compiled a significant criminal record.

(App. B, 9a).

The Seventh Circuit said residential placement was a "necessary predicate for learning" for retarded children who need basic social skills such as toileting, dressing and feeding, but not for Dale M., who was not retarded (App. B, 9a). The Court concluded that for Dale M., residential placement was a response to medical, social or emotional problems that are segregable from the learning process, but pointed to no evidence that his needs were segregable or that Elan School provided him medical or other services disallowed by the IDEA. Reaching beyond the record and departing from the other circuits, the majority effectively denied residential placement to any emotionally disabled student in the Seventh Circuit's jurisdiction unless he is also retarded or has cognitive disabilities. Dale's processing deficits identified years before, are neurological deficits that affect learning.

THE DISSENT

The dissent rebuked the panel for failing to give:

> deference to the manifest will of the Congress that the District must provide support services that are necessary for the meaningful delivery of educational services. By holding that, as a matter of law, the residential program at Elan does not come within the ambit of the Act, the majority not only dooms Dale M.'s case but also sets

> this circuit on a course different from that of all the courts that have interpreted this provision.

(App. B, 10a, 11a).

The dissent cautions that the Seventh Circuit's majority substitutes a new test for related services: costs for a related service which may meet the Congressional mandate that it is "a necessary predicate for learning" can be denied to a disabled child if the support service is not aimed at a problem that is "primarily educational", and the majority defines emotional disabilities as not primarily educational.

The dissent notes that Dale M.'s truancy is:

> no doubt complex in its causation and therefore in the degree of its interrelatedness with his capacity to cope with the usual demands of education. We lack the institutional capacity to conduct an independent analysis of Dale M.'s educational needs. ... Notably, here the District itself considered Dale M.'s truancy to be related to his educational progress until the need for a residential placement, and the attendant expense, became an issue. It was only at that point that the District took the position that such a program was beyond it obligations under the Act.

(App. B, 11a, 12a).

Concerned that the majority failed to stay within the record in finding that Elan School merely provided "confinement", the dissenting judge commented on the record regarding Elan School:

> Yet, the record makes clear that the program at Elan involves three separate components, life skills,

> counseling and class work. Reasonable people can disagree about the effectiveness of providing a structured environment that demands contributing labor to a communal living environment; however, none of us who wear black robes are in an institutional position to second guess the Illinois Department of Education that approved the program as a permissible placement for Illinois school children.
>
> In sum, I must conclude that the court has improvidently and erroneously parted company with the other circuits that have defined when a residential placement is permissible. In doing so, it has set the courts of this circuit on a course at odds with the course set throughout the United States for the provision of support services under the Act. It has compounded that error by substituting its own view for that of professional educators as to the needs of Dale M. and the merits of the Elan program. Accordingly, I respectfully dissent.

(App. B, 12a, 13a).

F. THE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING ENBANC.

Dale M. filed a Petition for Rehearing with Suggestion for Rehearing *En banc*, which was denied on April 11, 2001, with the Honorable F. Ripple and Honorable Ilana Diamond Rovner voting to grant the petition for rehearing *en banc*. (App. A).

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE

OPINIONS OF THE OTHER CIRCUITS AND CREATES UNCERTAINTY AND DISPARATE TREATMENT OF EMOTIONALLY DISTURBED STUDENTS

The Opinion below is at odds with the holdings of other U.S. Courts of Appeals on the important issue of the criteria for residential placement for emotionally disturbed children. In marked contrast to the Seventh Circuit's *Dale M.* test, that the costs of a support service are to be disallowed if the support services are not aimed at a problem that is "primarily educational", the U.S. Court of Appeals for the Third Circuit has upheld the Congressional mandate which requires the provision of a support service when they are "a necessary predicate for learning", *Kruelle v. New Castle County Sch. Dist.*, 642 F. 2d 687, 693 (3d Cir. 1981). Thus, in the Third Circuit, emotionally disturbed students would be entitled to residential placement, as are retarded children and children with other disabling characteristics. In the Fourth Circuit, dyslexic students are entitled to residential placement under the Act. *Florence County School District Four v. Carter*, 950 F.2d 156 (4th Cir. 1991), *affirmed*, 510 U.S. 7 (1993); *Ridgewood Board of Education v. N.E.*, 172 F. 3d 238 (3rd Cir. 1999). The Seventh Circuit has created the Dale M. exception for emotionally disturbed students but has not applied such a standard for retarded students. *Board of Ed. Of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F. 3d 1162 (7th Cir. 1994).

Other Circuit Courts are also at odds with the majority opinion below. The split in the Circuits is apparent in a recent Eighth Circuit decision on point with Dale M.'s case, but with the opposite outcome. *Independent School District No. 284 v A.C.*, 2001 U.S. App. LEXIS 17263 (8th Cir. 2001). In *A.C.*, the student had emotional and behavioral disorders whose manifestation included classroom disruption, profanity, insubordination and truancy. The school district tried an off-

campus day center, which did not work because she would either leave the center or not show up at all. She used alcohol and illegal drugs, was sexually promiscuous, repeatedly ran away from home, was thought to have forged checks, and was hospitalized three times for threatening or attempting suicide. When her mother requested residential placement, the county offered a correctional facility, which mother declined. The school personnel all agreed that A.C.'s behavior was interfering with her academic progress. The school tried to get the court to order a residential school but the court refused and instead ordered A.C. to attend school, but the child did not comply with the order.

Parent requested residential placement from the school district, which refused and offered a day program. The school district said it should only pay "educational" costs, not costs related to lodging or counseling. A.C. was evaluated and found to have no L.D., ADD or deficiencies of intelligence or memory. A.C. was diagnosed with "conduct disorder" and the evaluator recommended that A.C. be placed in a secure facility, largely because of truancy. While a day school "could provide educational services, the services would be ineffective … due to the nature and extent of her emotional and behavioral disorder". (*Id.* at 2). The state review office found that it was necessary for the student to be in a secure residential treatment facility in order to gain educational benefit (*Id.*). The district court reversed as to residential placement because the day program proposed "would educationally meet her needs, … from the standpoint of the individualized kind of work that she needs to meet her educational needs." (*Id.*)

Parent appealed to the Eighth Circuit. The Court noted that "the IDEA requires that a state pay for a disabled student's residential placement if the student, because of his disability, cannot reasonably be anticipated to benefit from instruction without such a placement. (*Id.* at 3, citing to *Mrs. B. v. Milford*

Board of Education, 103 F. 3d 1114, 1122 (2d Cir. 1997); *McKenzie v. Smith*, 248 U.S. App. D.C. 387, 771 F. 2d 15, 27, 1534 (D.C. Cir. 1985); *Kruelle v. New Castle County School Dist.*, 642 F. 2d 687, 693 (3d Cir. 1981).

In *A.C.*, the child did not have neurological deficits which would interfere with her learning and has average intelligence, without ADD or ADHD. The district court had denied residential placement because the child was unwilling but not unable to attend the day school:

> [w]hile one manifestation of A.C.'s emotional behavioral disorder is her *unwillingness* to attend school or comply with the requirements of ISD 284's IEP, there is nothing in the record to support a conclusion that there is anything about A.C.'s disorder which renders her *unable* to attend school or *unable* to comply with the IDEA. (*Id.* at 4).

The Eighth Circuit disagreed:

> We do not believe, however, that the analysis can be limited to a stark distinction between unwillingness and inability to behave appropriately. There is a gray area between normal, voluntary conduct and involuntary physiological response, and that area is where Congress has chosen to locate behavioral problems such as A.C.'s. The IDEA clearly includes "emotional disturbances" as disabilities. 20 U.S.C. §1401(3)(A)...
>
> Read naturally and as a whole, the law and regulations identify a class of children who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations. See: *Honig, California Superintendent of Public Instruction v. Doe*, 484 U.S. 305, 320, 98 L. Ed.

> 2d 686, 108 S. Ct. 592 (1988)(stating, of an emotionally disturbed student, that "it is [the student's] very inability to conform his conduct to socially acceptable norms that renders him 'handicapped' within the meaning of the EHA").

(*Id.* at 4).

Likewise, it is Dale M.'s very inability to conform his conduct to socially acceptable norms that renders him disabled under the IDEA.

In rejecting the new *Dale M.* standard set by the Seventh Circuit, "that a problem resulting from a disability is separable from the learning process if the problem is not primarily educational", the Eighth Circuit held:

> Nor do we agree with the Seventh Circuit that a problem resulting from a disability is separable from the learning process if the problem is "not primarily educational." *Dale M. v. Bd. of Ed. of Bradley-Bourbonnais High School Dist. No. 307, 237 F.3d 813, 817 (7th Cir. 2001).* If the problem prevents a disabled child from receiving educational benefit, then it should not matter that the problem is not cognitive in nature or that it causes the child even more trouble outside the classroom than within it. What should control our decision is not whether the problem itself is "educational" or "non-educational," but whether it needs to be addressed in order for the child to learn.

(*Id.* at 5).

In determining that A.C. required residential placement, the Eighth Circuit said that while a day program might provide an appropriate kind of instruction, residential placement was a

required related service necessary to provide educational benefit, and that, as in Dale M.'s case, the only educators who do not recommend residential placement work for the school district that is being asked to pay for it.

Using Dale M.'s case as a road map, the school district in *A.C.* tried to characterize the child's need for a residential placement as a need for confinement and argued the "confinement" is not a related service that it is required to provide. Considering but rejecting this argument, the Eighth Circuit accepted that the residential aspect of the facility would have a therapeutic effect, that at a residential program, the environment is the therapy, that a relearning and socialization process is provided in the environment that assists the student in altering behavior. (*Id.* at 6). While confinement may be a reason for residential placement, there was an independent and sufficient reason for the residential placement – to address the psychological problem that has prevented the child from making acceptable educational progress. (*Id.*).

Likewise, in Dale's case his failure for two and a half years in all programs in the School District was a compelling reason for residential placement for educational reasons. High school typically last for four years. Dale M. was in his third year in the School District with no credits.

The Eighth Circuit concluded that the recommendation for residential placement was a considered judgment based on an assessment of the student's individual needs. (*Id.* at 7). The Eighth Circuit rejected the Seventh Circuit standard and ordered residential educational placement for A.C., even though it would have a positive effect on problems that were not primarily educational.

In the Sixth Circuit the test of the appropriateness of a private placement is whether it confers educational benefit;

parents should not have to let their child languish in inappropriate placements. *Cleveland Heights University Heights City School District v. Boss*, 144 F. 3d 391 (6th Cir. 1998). In the Seventh Circuit, the test is not whether the private placement conferred educational benefit, but whether the disability is emotional or cognitive in nature.

Instead, the Seventh Circuit strains to carve out a new test to justify the result they intend – punishment not education for emotionally disturbed children[6]. This devastating impact of the opinion below warrants this Court's intervention in order to resolve the split between the Circuits.

Congress enacted the IDEA to ensure that all disabled children, regardless of the severity or complexity of their disabilities are provided a free appropriate public education ("FAPE"). 34 C.F.R. Sec. 300.125(a)(1)(i). 34 C.F.R. Secs. 300.300(a)(3)(i) & (ii). Special education is defined as specially-designed instruction which means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction – to address the unique needs of the child that result from the child's disability. 34 C.F.R. Secs. 300.26(b)(3)(i) & (ii). The delivery of services includes delivery in a residential setting. IDEA further requires that if placement in a public or private residential program is necessary to provide special education and related services to a child with disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. 34 C.F.R. Sec. 300.302. The IDEA requires special education and related services to a wide variety of disabilities.

The disability categories under the IDEA include mental retardation, hearing impairment including deadness, speech or

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6 Interestingly, the IDEA (revised in 1997) even protects the rights of disabled students between the ages of 18 – 21 who are in adult prisons. 34 C.F.R. Sec. 300.311.

language impairment, visual impairment including blindness, emotional disturbances, orthopedic impairment, autism, traumatic brain injury, other health impairment, a specific learning disability, deaf-blindness and multiple disabilities. 34 C.F.R. Sec. 300.7(a)(1). It is undisputed that Dale M. is emotionally disturbed as defined in the Act and that his emotional disturbance adversely has affected his educational performance to a marked degree over a long period of time. 34 C.F.R. Sec. 300.7(c)(4). Mental retardation, orthopedic impairment, other health impairments, learning disabilities, traumatic brain injury, visual impairments are all likewise defined in the Act. 34 C.F.R. Secs. 300.7(c)(6), (8), (9), (10), (12) and (13). Any disability may be the result of medical conditions or not be "primarily educational". IDEA contains no language disqualifying students from special education solely because the disability may not be primarily educational. Services are to be provided if there is an educational impact or education is affected.

For example, a wheel chair bound child whose disability is primarily physical and which is caused by a medical condition may not be refused appropriate special education services merely because his disabilities cause him more problems in the community than they do in the classroom. Physical therapy/Occupational therapy, psychiatric consultation and a whole host of related services not delivered by a teacher, thus not "educational", are a "non-academic" related service, available under the IDEA. The focus of related services under the IDEA is on the impact of the disability, not on whether the service is "primarily educational", with a narrow definition of "educational" as classroom academics.

Yet this is precisely the standard the court below seeks to impose on Dale M. The Appeals Court's opinion, if left undisturbed, would allow school districts to deny appropriate special education and related services to any disabled student

whose disabilities might cause him more problems outside of rather than within the classroom. It also provides a roadmap for schools to deny related services to students: send emotionally disturbed students home, put them on homebound. As in Dale M.'s case, sending him home from school hardly created improved school attendance. Moreover, in Dale's case, the School District acknowledged the disability's impact only until he failed in all their programs and residential was needed.

The Court below would constrict the IDEA so that the most severely disabled children would once again be denied services, as they were before the enactment of the Act. The Court below would have Dale M. returned to an already unsuccessful part-time program where the staff testified that almost all the students do drugs without consequence. Without ever addressing the efficacy of the District's IEP, the court rubber-stamps this IEP which, if successful, would have Dale excluded from school 80% of the time. IDEA is hardly served by a court which advocates reduced school attendance, sending a student home because of his disabilities and daily involvement with unrestricted drug abusers.

The Court below seems to say that because Dale's placement at the Elan School had benefits besides his improved academic performance, it is impermissible under the IDEA. Apparently, in the opinion below, Dale M.'s youthful indiscretions served to strip him of his eligibility under the IDEA[7]. Dale M.'s earlier IEPs and programs failed to address his attendance. The District's 5 hour a week home tutoring with no related services failed to address his emotional

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7 The Court below does not seem to understand that a relative does not just "withdraw" a child from detention. If such were true, the jails would be empty. Th logical conclusion is that Dale's offenses, although not to be taken lightly, were of the nature to warrant probation, not jail, and did not render him an incorrigible criminal or warrant the wrath and punishment of the Seventh Circuit, which far exceeded his legal consequences.

disabilities or increase his school attendance, an issue long identified by the School District as part of his educational disability.

While dismissing the ISBE-approved Elan School as outside the ambit of the IDEA as a matter of law and holding that emotional disturbance under IDEA does not constitute a disability that is "primarily educational", the Seventh Circuit departs not only with the other Circuits, but also with the IDEA, which contains no such exclusion. The Opinion below agrees that residential placement is appropriate for disabled children who need "basic social skills" but not for Dale M., because "[h]is problem is a lack of proper socialization". Under this novel standard, a mentally retarded student is entitled to residential placement to train him in basic social skills, but Dale M. is not, solely because he has a different disability.

When the majority opinion attempts to cast Dale's need for residential placement as a "response to medical, social or emotional problems that are segregable from the learning process", it stands in conflict not only with Dale M. and his parent, but also with the School District and the State of Illinois. The School District has long agreed in writing that Dale's emotional disabilities are not segregable from the learning process; the State of Illinois approved the Elan School as a residential special education school for the placement and funding of emotionally disturbed students like Dale M. The Elan School provided only special education and related services to which Dale is entitled. Dale M. seeks no reimbursement for medical services, only special education and related services.

Elan School does not provide medical services, nor does ISBE approve medical facilities (or out-of-state correctional facilities). It only approves special education schools for placement of disabled students under the IDEA. The incidental

benefit of Elan School, that Dale did not have the opportunity to engage in substance abuse and criminal activity as he would have had in the part-time school program the School District proposed, where almost all the students do drugs and are sent home for behavior problems, seems unfair to the majority. Apparently, this incidental benefit is so onerous as to strip Dale M. of the services which are his entitlement under the IDEA. The dissent clearly recognizes the deep chasm of substance between the Circuits if the opinion is allowed to stand.

CONCLUSION

This case presents questions of exceptional importance regarding the rights of emotionally disturbed children. If the majority opinion below is allowed to stand, emotionally disturbed students in the Seventh Circuit will not be entitled to residential special education unless they also have cognitive disabilities, such as learning disabilities or mental retardation. This is a direct conflict with Congressional intent in approving the Act. Children with cognitive disabilities will be favored over children with emotional disabilities, and emotionally disturbed children will be prevented from receiving related services which provide ancillary benefits outside the classroom, or which address problems that cause the child even more trouble outside the classroom than within. Such a system denies appropriate services to severely disabled children whom the Act is intended to protect.

This Court should address the split in the circuits on this important issue involving emotionally disturbed students and public school responsibilities under the Act.

Accordingly, Petitioners Alice M. and Dale M. respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED APRIL 11, 2001

DALE M., by his mother and next friend, Alice M.,

Plaintiffs-Appellees, Cross-Appellants,

v.

BOARD OF EDUCATION OF BRADLEY-BOURBONNAIS HIGH SCHOOL DISTRICT NO. 307, JERRY SIKES, WILLARD DEWITT, et al.,

Defendants-Appellants, Cross-Appellees.

Nos. 98-2682, 98-2819 and 99-1817

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

April 11, 2001, Decided

Before: Posner, Coffey, and Ripple, Circuit Judges.

ORDER

On January 26, 2001 plaintiffs-appellees, cross-appellants filed a petition for rehearing and petition for rehearing *en banc* and on February 16, 2001 defendants-appellants, cross-appellees filed an answer. A vote of the panel and active members of the Court was requested, and a majority of the judges voted to deny a rehearing *en banc*. The petition is therefore **DENIED.**

* Hon. Kenneth F. Ripple and Hon. Ilana Diamond Rovner voted to grant the petition for rehearing *en banc*.

APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED JANUARY 12, 2001

DALE M., by his mother and next friend, Alice M.,

Plaintiffs-Appellees, Cross-Appellants,

v.

BOARD OF EDUCATION OF BRADLEY-BOURBONNAIS HIGH SCHOOL DISTRICT NO. 307, JERRY SIKES, WILLARD DEWITT, et al.,

Defendants-Appellants, Cross-Appellees.

Nos. 98-2682, 98-2819 and 99-1817

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Argued June 7, 2000

Decided January 12, 2001

Before: POSNER, COFFEY, and RIPPLE, Circuit Judges.

POSNER, Circuit Judge

The district judge held that a public school district in Illinois had violated its duty under the Individuals with Disabilities Education Act to provide Dale M. with "a free appropriate public education that emphasizes special education and related services designed to meet [disabled children's] unique needs," where "related services" include "transportation,

and such developmental, corrective, and other supportive services (including ... psychological services ... [and] social work services ...) as may be required to assist a child with a disability to benefit from special education." *20 U.S.C. § § 1400*(d)(1)(A), 1401(22). Dale became a student in the district in 1993, when he was 14 years old. He soon became a serious disciplinary problem. He disrupted classes and was truant. The following year he was placed in a "therapeutic day school" designed to deal with disruptive and truant students, [*2] but in his first four months he attended school only 20 days, though when he did attend he behaved himself, did the assigned work, and got good grades. For some time he had been drinking alcohol to excess and also consuming marijuana, cocaine, and other illegal drugs, and in January of 1995 he was hospitalized for depression and at the same time charged with residential burglary and theft of a car. He was placed on probation for these offenses. When he got out of the hospital he refused to return to school, but received home instruction until November, when he was again charged with residential burglary and this time sent to jail. He was examined by a psychologist who found that Dale has no learning disability but instead what the psychologist called a "conduct disorder," along with depression and substance abuse.

The school district wanted to send Dale back to the therapeutic day school. Instead, his mother, with whom he was living (his parents are divorced), obtained Dale's release from jail and placed him in a residential school, the Elan School, in Maine. She demanded that the school district pay for Dale's attending Elan, as otherwise he would not be getting the free appropriate [*3] public education to which he was entitled. The school district refused. The Elan School does not offer psychiatric or other medical treatment for substance abuse or depression. As far as we can determine, it's just a boarding school for difficult children. Dale did not like the school, and was excluded from most school activities because of his

belligerent attitude.

The mother sought reimbursement of the expense of Dale's attending Elan. Her claim was adjudicated in succession by two hearing officers appointed by the state. The first ordered the public school district to pay but the second, the reviewing officer, reversed the order of the first. He could find no evidence that Elan provided a superior educational experience for Dale to the therapeutic day school, let alone any treatment for his "conduct disorder" or his depression and substance abuse; it merely provided confinement, thus solving the problem of his truancy. The hearing officer did not think that the statute required the school district to pay for confining a truant student.

The district judge reversed and ordered reimbursement. The school district has paid pursuant to the district court's order, and the plaintiffs [*4] argue that this makes the school district's appeal moot, but that is wrong. A judgment creditor who pays the judgment pending appeal instead of posting a supersedeas bond (which would automatically stay collection, see Fed. R. Civ. P. 62(d)) is entitled to the return of its money if the decision is reversed, and so the payment does not moot the appeal unless the appellant has relinquished his right to seek repayment if he wins. *In re Farrell Lines Co., 245 U.S. App. D.C. 393, 761 F.2d 796 (D.C. Cir. 1985)* (per curiam); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2905, pp. 525-26 (2d ed.1995); cf. *United States v. Hougham, 364 U.S. 310, 312-13, 5 L. Ed. 2d 8, 81 S. Ct. 13 (1960); United States for Use and Benefit of H & S Industries, Inc. v. F.D. Rich Co., 525 F.2d 760, 764-65 (7th Cir. 1975).* The school district has not relinquished that right.

So we must decide whether the district court's decision was correct. As we explained in *Morton Community Unit*

School Dist. No. 709 v. J.M., 152 F.3d 583, 587-88 (7th Cir. 1998), when the district judge does not take fresh evidence but instead [*5] bases his review of the hearing officer's decision on the record compiled in the administrative proceedings, he is required to give "due deference" to that decision. That is, the fact that he disagrees with the officer is not enough to justify setting aside the latter's order; he must be strongly convinced that the order is erroneous. See also *Board of Education v. Rowley, 458 U.S. 176, 206, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982); Patricia P. v. Board of Education, 203 F.3d 462, 466-67 (7th Cir. 2000); Linda W. v. Indiana Dept. of Education, 200 F.3d 504, 506 (7th Cir. 1999); Board of Education v. Illinois State Board of Education, 41 F.3d 1162, 1167 (7th Cir. 1994); Susan N. v. Wilson School District, 70 F.3d 751, 757 (3d Cir. 1995).* The hearing officer to whom the judge is to defer is the second, that is, the appellate officer, *Board of Education v. Illinois State Board of Education, 184 F.3d 912, 915 (7th Cir. 1999); Heather S. v. Wisconsin, 125 F.3d 1045, 1053-54 (7th Cir. 1997); Thomas v. Cincinnati Board of Education, 918 F.2d 618, 624 (6th Cir. 1990),* just as, when the National [*6] Labor Relations Board reverses one of its administrative law judges, the reviewing court defers to the board, not to the ALJ, e.g., *Universal Camera Corp. v NLRB, 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951); Dilling Mechanical Contractors, Inc. v. NLRB, 107 F.3d 521, 523-24 (7th Cir. 1997); Webco Industries, Inc. v. NLRB, 217 F.3d 1306, 1311 (10th Cir. 2000),* and unlike, for example, judicial review of benefits determinations in black lung cases, where the courts defer to the ALJ's decision rather than to the decision of the Benefits Review Board on appeal from the *ALJ to it. E.g., Old Ben Coal Co. v. Prewitt, 755 F.2d 588, 589-90 (7th Cir. 1985).*

But, by further analogy to the rule in judicial review of Labor Board decisions, *Universal Camera Corp. v NLRB, supra, 340 U.S. at 491-97; Dilling Mechanical Contractors, Inc. v. NLRB, supra, 107 F.3d at 524,* we believe that the

reviewing court, in deciding whether to uphold a reversal by the second hearing officer of the first hearing officer's decision, must give considerable weight to any credibility determinations made by the first hearing officer, since [*7] the second officer, exercising as he does an appellate rather than a trial function, will generally not have been in a position to second guess those determinations. See *Heather S. v. Wisconsin, supra, 125 F.3d at 1053-54.*

Evidence was presented to the district judge, in the form of affidavits and other documents attached to the summary-judgment papers, but there is no indication in his opinion that he considered any of it. Cross-motions for summary judgment are the standard method for presenting a case to a district court for decision on the record compiled by the administrative tribunal that the court is reviewing. *Patricia P. v. Board of Education, supra, 203 F.3d at 466; Heather S. v. Wisconsin, supra, 125 F.3d at 1052; Hunger v. Leininger, 15 F.3d 664, 669-70 (7th Cir. 1994); Kirkpatrick v. Lenoir County Board of Education, 216 F.3d 380, 385 (4th Cir. 2000).* The grant of the plaintiffs' motion thus implied that the judge was not considering any evidence not presented in the administrative proceedings. The evidence that had been submitted for the first time in the district court indicated, for example, that after [*8] the decision by the second hearing officer Dale graduated from Elan. But the judge said that "Dale is receiving an educational benefit from Elan" (emphasis added), implying that Dale was still at the school. This is a further indication that the judge didn't consider any of the new evidence.

The judge recited the correct, the deferential, standard of review for the case where no new evidence is considered (still another indication that he did not consider the new evidence), but when he came to actually discuss the second hearing officer's decision, he applied an incorrect standard. He said for example that he "disagrees with the reviewing officer's

conclusion that Elan was inappropriate" and "a preponderance of the evidence shows that Elan is an appropriate placement for Dale." That is the language of de novo determination of contested factual issues. The judge may have been confused by the language of the statute: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court [*9] determines is appropriate." *20 U.S.C. § 1415*(i) (2)(B). When the court has before it evidence that was not before the hearing officers, the amount of deference due the reviewing officer declines, since the latter's decision was based on an incomplete record. But when there either is no new evidence or the judge for some reason doesn't consider it, he owes considerable deference to the reviewing officer.

When due deference is given that officer, we think it plain that his determination that placement in the Elan school was not the "free appropriate education" to which the statute refers should not have been disturbed. It is true that Dale has psychological problems that interfered with his obtaining an education, even though he has no learning disability or retardation. And the statute refers explicitly to "psychological services" as one type of "related services" that the statute may require a school district to pay for if, without them, the disabled child--and we do not understand the school district to be denying that Dale's problems add up to a disability within the meaning of the statute, *20 U.S.C. § 1401*(3); 34 C.F.R. § 300.7; [*10] *Board of Education v. Nathan R., 199 F.3d 377, 379 n. 2 (7th Cir. 2000);* compare *Rodiriecus L. v. Waukegan School District No. 60, 90 F.3d 249, 254 (7th Cir. 1996)*--cannot obtain an education. But the Elan School does not provide psychological services, at least to Dale. For him all it provides is confinement. He was placed in Elan not from any school in the defendant school district, but from jail. Elan is a

jail substitute. An incorrigible truant and lawbreaker, Dale does better in every respect when he is in a custodial setting than when he lives at home.

The only difference between the therapeutic day school in which the school district put him (and wanted to return him to, despite his history of truancy) and Elan is that Elan is a boarding school specializing in anfractuous kids. So at least the second hearing officer determined, and the district court was obliged to defer to that determination, which was both supported by the evidence and within the presumed superior competence of the administrative process to resolve matters of educational policy. Hence Elan was the "appropriate" placement for Dale, within the meaning of the statute, only if confinement [*11] is a related service within that meaning, since obviously it is not an educational service. We think--and this is a pure legal issue, as to which we owe no deference to the hearing officer, *Morton Community Unit School District No. 709 v. J.M., supra, 152 F.3d at 587*--that it stretches the statute too far to classify confinement thus.

The essential distinction is between services primarily oriented toward enabling a disabled child to obtain an education and services oriented more toward enabling the child to engage in noneducational activities. The former are "related services" within the meaning of the statute, the latter not. *Butler v. Evans, 225 F.3d 887, 894, 2000 WL 1231053,* at *4-*6 (7th Cir. 2000). In our Morton case, for example, the medical-support services rendered the plaintiff were for the purpose of enabling him to attend school. *152 F.3d at 583.* In contrast, the purpose of the "service" that the school district is being asked to pay for is to keep Dale out of jail, both directly, because the judge was willing to release him from jail to Elan, and indirectly, because Dale is less likely to commit burglary and other crimes when [*12] he is in a residential facility than when he is living at home with only his mother to keep an eye on him.

Another way to put this is that Dale's problems are not primarily educational. He has the intelligence to perform well as a student and no cognitive defect or disorder such as dyslexia that prevents him from applying his intelligence to the acquisition of an education, without special assistance. His problem is a lack of proper socialization, as a result of which, despite his tender age, he has compiled a significant criminal record. His substance abuse interferes with his schooling; that is true; but it interferes with much else besides, such as ability to conform to the law and avoid jail. Supposing that the most effective educational program for Dale would be to take correspondence courses while confined in a prison, we do not think his mother would be arguing that the school district would have to pay the prison authorities for the expense of incarcerating him. But that is close to what she is arguing--that since confinement, among its other benefits to Dale, will make it easier for him to obtain an education, the school district is responsible for the cost of confinement. [*13] That, we conclude, goes too far.

This is not a case like *Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981),* where residential placement was necessary for educational reasons. The case involved a thirteen year old who had an IQ below 30 and could not walk, dress, or eat without assistance. Under stress, he would self-induce vomiting and choking; inconsistent approaches or environments would trigger this behavior. For that child, an education meant training in the basic social skills of using the toilet, dressing, feeding, and simple communication. That education required residential placement, which was therefore a "necessary predicate for learning" as opposed to being--a good description of the present case, as of *Burke County Board of Education v. Denton, 895 F.2d 973 (4th Cir. 1990)*--a "response to medical, social or emotional problems that are segregable from the learning process." *642*

F.2d at 693; cf. Tennessee *Dep't of Mental Health & Mental Retardation v. Paul B., 88 F.3d 1466 (6th Cir. 1996); McKenzie v. Smith, 248 U.S. App. D.C. 387, 771 F.2d 1527 (D.C. Cir. 1985).* Although *Teague Independent School District v. Todd L., 999 F.2d 127, 132 (5th Cir. 1993),* [*14] could be read to leave open the possibility that "twenty-four hour supervision in a locked unit" might be a related service, the court pointedly remarked that the "focus" of the highly restrictive facility that Todd's parents preferred "was on behavior management," not education.

No other issues need be discussed. The judgment in favor of the plaintiffs, and the award of attorneys' fees to them, are reversed with directions to enter judgment for the defendants. The dismissal of the other counts in the complaint is affirmed. The motion to dismiss the school district's appeal on the ground of mootness is denied, and the plaintiffs' cross-appeals are denied because they have no merit in light of our decision of the school district's appeal.
Affirmed in Part, Reversed in Part.

DISSENTBY:
RIPPLE

DISSENT:

RIPPLE, Circuit Judge, dissenting. While chiding the district court (unfairly in my view) for not having given sufficient deference to the superficial analysis of the Level II hearing examiner, the majority fails itself to give adequate deference of a far more fundamental character--deference to the manifest will of the Congress that the District must provide support services that are necessary [*15] for the meaningful delivery of educational services. By holding that, as a matter of law, the residential program at Elan does not come within the ambit of the Act, the majority not only dooms Dale M.'s case

but also sets this circuit on a course different from that of all the courts that have interpreted this provision.

Recognizing that the nature of support services necessarily will be varied and, in the case of some children, broad, every circuit that has addressed the question has held that the Congressional mandate requires the provision of a support service that is "a necessary predicate for learning," *Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 693 (3d Cir. 1981),* and not "segregable from the learning process," id. See Tennessee *Dep't of Mental Health & Mental Retardation v. Paul B., 88 F.3d 1466, 1471 (6th Cir. 1996)* (stating that districts are not responsible for residential placement "separable from the learning process" and citing Kruelle); *Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 980 (4th Cir. 1990)* ("Where medical, social or emotional problems are intertwined with educational problems, courts recognize that the [*16] local education agency must fund residential programs ....") (citing Kruelle); *McKenzie v. Smith, 248 U.S. App. D.C. 387, 771 F.2d 1527, 1533 (D.C. Cir. 1985)* (quoting Kruelle standard). Today, this circuit substitutes for that test a very different formulation: Costs are to be disallowed if the support services are not aimed at a problem that is "primarily educational." Slip op. at 7. That the difference between the panel majority's formulation and that of our sister circuits is not just one of semantics but a chasm of substance is made starkly clear by the analysis of the Third Circuit in Kruelle. There, it noted that "basic self-help and social skills such as training, dressing, feeding and communication" can be part of the necessary process of education. *Kruelle, 642 F.2d at 693* (internal quotation marks and citations omitted).

Dale M.'s truancy is no doubt complex in its causation and therefore in the degree of its interrelatedness with his capacity to cope with the usual demands of education. We lack the institutional capacity to conduct an independent analysis of

Dale M.'s educational needs. Indeed, we previously have been "cautioned that courts [*17] lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." *Board of Educ. v. Rowley, 458 U.S. 176, 205, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982)* (internal quotation marks and citations omitted). Notably, here the District itself considered Dale M.'s truancy to be related to his educational progress until the need for a residential placement, and the attendant expense, became an issue. It was only at that point that the District took the position that such a program was beyond it obligations under the Act.

In determining that the Elan program goes "too far" to be within the coverage of the Act, the majority takes issue with the characterization of Dale M. reached by the professional educators and, indeed, by the administrative tribunals and the district court. In the majority's view, he is a delinquent deserving of punishment, not education. The majority is entitled to its view; in deciding this case, however, it must stay within the record, a record that includes the conclusions of professional educators who viewed his situation in a very different light. For instance, in evaluating the program at Elan, [*18] the majority characterizes the program as one that simply provides "confinement." Slip op. at 6. Yet, the record makes clear that the program at Elan involves three separate components, life skills, counseling and class work. Reasonable people can disagree about the effectiveness of providing a structured environment that demands contributing labor to a communal living environment; however, none of us who wear black robes are in an institutional position to second guess the Illinois Department of Education that approved the program as a permissible placement for Illinois school children. See *Butler v. Evans, 225 F.3d 887, 894* (noting that residential treatment at a psychiatric hospital could not be compensable as an educational placement because it was not an accredited educational institution); *Seattle Sch. Dist., No. 1 v. A.S., 82 F.3d*

1493, 1502 (9th Cir. 1996) (rejecting school district's argument that it should not be responsible for residential placement in part because residential facility was "an accredited educational institution under state law"); *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635, 646* (finding [*19] that school district was not financially responsible for placement because the facility was "not included as [an] educational placement option[ ] for handicapped pupils in that state").

In sum, I must conclude that the court has improvidently and erroneously parted company with the other circuits that have defined when a residential placement is permissible. In doing so, it has set the courts of this circuit on a course at odds with the course set throughout the United States for the provision of support services under the Act. It has compounded that error by substituting its own view for that of professional educators as to the needs of Dale M. and the merits of the Elan program. Accordingly, I respectfully dissent.

APPENDIX C - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS DATED AND DECIDED JUNE 15, 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

No. 96-CV-2254

DALE M., by his mother and next friend, Alice M.,

Plaintiffs,

v.

BOARD OF EDUCATION OF BRADLEY-BOURBONNAIS HIGH SCHOOL DISTRICT NO. 307, JERRY SIKES, WILLARD DEWITT, et al.,

Defendants.

June 15, 1998.

ORDER

MCCUSKEY, District J.

Dale M., who is a resident in the Bradley-Bourbonnais High School District No. 307 (the "District"), has been identified as a special education student pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1402 *et seq.* Alice M. is Dale's mother. The Defendants are all administrators and members of the Board of Education for the District. After exhausting the administrative process provided by the IDEA, the Plaintiffs filed suit in this

Court seeking reversal of the Level II Review Board decision finding: (1) that the District did not have to pay for Dale's residential placement in a private facility, a placement which his mother made unilaterally without the District's consent; and (2) that Dale was not entitled to an independent evaluation. Additionally, the Plaintiffs claim that the District violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, and violated Dale's Fourteenth Amendment rights, pursuant to 42 U.S.C. § 1983. Both parties have filed cross-motions for summary judgment. For the following reasons, we grant the Defendants' Motion for Summary Judgment [# 9] in part, deny it in part, and grant the Plaintiffs' Cross-Motion for Summary Judgment in part, and deny it in part [# 29].

I. Facts

A. Background Facts

At the time of the filing of this suit, Dale was a 17 year old male student residing at the Elan School in Poland, Maine. He is presently diagnosed as having a behavior disorder with substantial involvement in drugs and alcohol.

In the Fall of 1993, at age 14, Dale began his first year as a student in the District. However, in his first year, he had disciplinary problems. Specifically, his teachers complained that he disrupted class, frequently walked out of school, and "cut" a number of classes. To address these problems, the District held a Multi-Disciplinary Conference ("MDC") in December of 1993. However, before any recommendations could be implemented, Dale was transferred to Watseka High School when he moved to live with his father. After attending Watseka for a semester, he returned to the District in the fall of 1994.

Another MDC was consequently held in September of

1994. As a result, an Individualized Education Plan ("IEP") was developed for Dale. The IEP provided for placement of Dale in the Kankakee Coop Therapeutic Day School ("Coop"). The Coop had self-contained classrooms with up to 13 students, a certified teacher, and a program assistant for each classroom. The ordinary school day was from 8:30 a.m. until 1:00 p.m., unless the student did not complete his assignments, in which case the student stayed until 3:00 p.m. to complete them.

The Coop used a five step time-out system for controlling disruptive behavior. A student was sent to a "time-out" room for various lengths of time when he engaged in disruptive behavior. In addition to the time out system, the Coop had detailed rules concerning dress, behavior during transport to and from the school, gang activities, and student driving. Finally, the program provided counseling by a social worker.

Dale entered the Coop program, but only attended school 20 days between his placement in the program in September, 1994 and January 10, 1995. His mother testified that she could not get Dale out of bed in the morning for school, could not get him to take the bus, nor enter the school when she drove him to school herself. However, according to his teacher, on 19 of the 20 days in which Dale did go to school, he did very well.

On January 10, 1995 Dale left the Coop because he was hospitalized for a major depressive disorder. He had been using alcohol and addictive drugs for some time, and at the time of hospitalization, he was charged with residential burglary and theft of a motor vehicle. While in the hospital, he received academic instruction through the hospital's educational program, and he performed very well in this program. On February 3, 1995, he was discharged from the hospital, and on March 21, 1995, he received probation for his criminal

activities.

Once out of the hospital, however, Dale refused to return to the Coop. Consequently, his mother requested that Dale be given home bound instruction for the Spring semester. The District granted the request, and Dale remained in home bound instruction until November of 1995, at which time he was charged and incarcerated for residential burglary.

Prior to making a decision regarding Dale's continued incarceration, the state court requested information regarding the long range plans for a residential placement for Dale. Dale's mother requested that another MDC be conducted by January 4, 1996 in order to consider a residential special education program for Dale. Although the District had difficulty conducting the MDC due to Dale's incarceration, an MDC was held on January 17, 1996. At the MDC, the District had at its disposal a number of reports and evaluations of Dale, including the psychological report of Dr. Baukus which was ordered by the court and the Behavior Report of the Detention Officer of Champaign County Youth Detention Center.

Dr. Baukus' report indicated that Dale had used LSD, marijuana, cocaine, and opium within the last year. This drug abuse included daily use of marijuana and 8 to 12 cans of beer a day. These habits were supported by Dale's pawning or selling his family's personal belongings.

Concerning Dale's disability, Dr. Baukus tested Dale for Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder, but found no basis supporting such a diagnosis for Dale. Indeed, Dr. Baukus found that Dale's reading skills were at the high school level and his math scores were beyond the high school level. Consequently, Dr. Baukus concluded that Dale did not have a learning disability, but instead had symptoms consistent with a Conduct Disorder.

Regarding Dale's substance abuse, Dr. Baukus found that Dale's problems with alcohol and drug abuse showed signs of dependence on both substances. Consequently, Dr. Baukus concluded that the chronicity of the conduct disorder and the level of chemical dependency indicated that Dale needed long term, in- patient treatment.

The Detention Officer's report stated that although Dale's behavior had improved, he received restrictions for misconduct on a number of occasions and that Dale had failed to display a consistent ability to function appropriately in a secure detention.

The MDC concluded that a residential placement for Dale was too restrictive, and recommended that he be placed back into the Coop program described above. This new IEP was nearly identical to the one formulated when Dale first entered the Coop in September of 1994.

Although Dale's mother requested a due process hearing, on January 23, 1996, upon obtaining the release of Dale from jail with probation until July, 1996, his mother unilaterally placed him in the Elan School in Portland Maine, a residential school, approved by the Illinois State Board of Education.

B. Level I Hearing

On March 22, 1996, the Level I due process hearing was held. At the hearing, witnesses testified and documents were presented establishing the above background facts. Additionally, Dale's mother presented the telephonic testimony of two witnesses, Mr. Yahr, a psychological examiner licensed in Maine, and Dr. Sapan, the clinical director of Elan.

Mr. Yahr's testimony indicated that he had only met with Dale briefly the night before the hearing, and had not tested or evaluated Dale. Thus, he was only offering his impressions of Dale. Consequently, upon objection by the District, the hearing officer ruled Mr. Yahr's testimony inadmissible because it added nothing new to the record.

Dr. Sapan testified that Elan has three components to their program: (1) life skills; (2) counseling; and (3) school classes. Consequently, mornings at Elan are devoted to life skills which consist of various jobs around the school. Counselling sessions are held in the afternoon, and school classes are held between 6:30 p.m. and 10:30 p.m.

Finally, a report was presented concerning Dale's progress at Elan. The report noted that Dale's participation in counseling group sessions was oppositional, Dale was not accepting the Elan program, and Dale was refusing to participate in the program in any meaningful way. However, academically, Dale was performing well.

On March 24, 1996, the hearing officer issued his decision. He found that the District's Coop Day program was inadequate to serve the needs of Dale, and the Elan residential School was an appropriate placement for Dale. Furthermore, the hearing officer concluded that the District acted appropriately in denying the parent's request for an independent evaluation given the amount of material already available and the court appointed psychological evaluation which had been recently performed.

C. Level II Due Process Hearing

The District appealed the hearing officer's ruling that Elan was an appropriate placement for Dale, and the parent appealed the denial of a request for an independent evaluation

to assess Dale's possible learning disabilities.

Pursuant to the Illinois Administrative Code, 23 Ill. Adm.Code. § 226.688(b), Dale's mother was allowed to introduce additional testimony at the Level II hearing. Before considering this additional evidence, however, the Level II reviewing officer reviewed the decision of the Level I hearing officer.

The reviewing officer found the Level I conclusions to be erroneous. He found that the hearing officer stated he would disregard the evidence of Yahr and Sapan due to their testimonies' highly technical nature and failure to add any new information to the record. Thus, the only information in the record concerning Elan was that it was a residential school approved by the Illinois State Board of Education. Furthermore, nothing in the record indicated why going to school between 6:30 p.m. and 10:30 p.m. was superior to the Coop Day program's hours of 8:30 a.m. to 1:00 p.m. Nor did the parent establish any educational benefit of assigning Dale to household clean-up duties. Moreover, the February report on Dale from Elan indicated that he was not benefitting from the program. Indeed, the opinion stated that Dale had lost all his privileges for his defiant, belligerent attitude. Finally, according to the reviewing officer, nothing in the record considered by the Level I hearing officer disclosed what Elan would do for Dale's behavior disorder.

The reviewing officer concluded that, given the above facts, the Level I ruling apparently rested on the assumption that Elan would benefit Dale by supervising his activities throughout the day, thus preventing his engagement in anti-social behavior outside of school. Such reasoning, according to the opinion, was erroneous in that the District is not required to provide custodial care after hours in order to control conduct during after school hours. Thus, there was no

educational need for residential placement. Rather, the recommendations for residential placement were all for medical reasons, specifically, Dale's chemical dependency. Consequently, the reviewing officer concluded that Elan was not an appropriate placement for Dale.

The Level II opinion also concluded that the Parent had failed to show that the District's Coop Day program was an inappropriate placement for Dale. The Level II reviewing officer found that Dale's refusal to attend school or get out of bed in the morning does not convert an otherwise appropriate placement into an inappropriate one. Furthermore, Dale's substance abuse is not a handicap of the type that is remediable with services funded under the Special provisions of the Illinois Administrative Code. Rather, those problems are medical, and the District has an obligation to provide educational benefits only, not to cure substance abuse.

Finally, the Level II opinion addressed the new evidence presented by the parent. This evidence consisted of further testimony by Mr. Yahr and Dr. Sapan, as well as Mr. Yahr's report evaluating Dale in May, 1996.

Mr. Yahr testified that Dale just sat in on his counselling sessions and did not want to talk about his feelings. Although Mr. Yahr stated that Dale had ADD, neither his report nor his testimony referred to any tests used to establish this diagnosis. However, Mr. Yahr recommended a residential placement for Dale, concluding that Dale's handicap would prevent him from attending the Coop Day treatment program as he did in the past.

Dr. Sapan's testimony indicated that Dale was receiving good grades, but was still doing nothing to change his situations, was wasting time in the program, and was becoming involved with other residents who were not doing well in the

program. He concluded that a day program would result in Dale becoming deeply involved in chemical abuse.

The Level II opinion concluded that this additional evidence did not establish the appropriateness of Elan's program. The opinion found that Dale lacked any real improvement in the 4 months which he was placed at Elan. Furthermore, as in the Level I hearing, the testimony did not establish that residential placement was for educational reasons. Rather, as was concluded concerning the evidence presented at the Level I hearing, the residential placement was for purposes of preventing truancy and involvement with drugs and alcohol.

Based upon the foregoing, the reviewing officer reversed the findings of the Level I hearing and held that Elan was not an appropriate educational placement for Dale and the District was therefore not responsible for the Parent's unilateral placement. The Level I hearing was affirmed with respect to the finding that the District was correct in denying the Parent's request for an independent evaluation.

II. Analysis

A. Standard of Review

Although the parties have filed motions for summary judgment, a district court's standard of review in an IDEA case is unique. *Heather S. v. State of Wisconsin,* 125 F.3d 1045, 1052 (7th Cir.1997). The IDEA provides that a district court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate." 20 U.S.C. § 1415(e)(2). "The motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record." *Heather S.,* 125 F.3d at 1052, *citing Hunger v. Leininger,* 15 F.3d 664, 669 (7th

Cir.1994), *cert. denied,* 513 U.S. 839 (1994). Consequently, although called a motion for summary judgment, the court's decision is based on the preponderance of the evidence, and the party challenging the outcome of the state administrative decision bears the burden of proof. 20 U.S.C. § 1415(e)(2); *Heather S.,* 125 F.3d at 1052.

Applying this preponderance of the evidence standard, the court is required to give "due weight" to the results of the administrative proceedings and not "to substitute [its] own notions of sound educational policy for those of the school authorities." *Heather S.,* 125 F.3d at 1052-53; *Board of Educ. of Community Consol. School. Dist. 21 v. Illinois State Bd. Of Educ.,* 938 F.2d 712, 716 (7th Cir.1991), *cert. denied,* 502 U.S. 1066 (1992). Furthermore, where, as in the present case, two administrative decisions came to different conclusions regarding the matter before the court, "federal courts are required to defer to the final decision of the state authorities, ... it mak[ing] no difference that there may have been some disagreement among the state officers during the course of the state proceeding." *Heather S.,* 125 F.3d at 1053, *quoting Thomas v. Cincinnati Bd. Of Educ.,* 918 F.2d 618, 624 (6th Cir.1990).

B. Statutory Framework

When reviewing state IDEA administrative decisions, "courts must be careful to avoid imposing their view of preferable educational methods upon the States." *Heather S.,* 125 F.3d at 1054, *quoting Carlisle Area School. v. Scott P.,* 62 F.3d 520, 529 (3d Cir.1995), *cert. denied,* 517 U.S.1135 (1996). Consequently, a state is obligated only to: (1) comply with the procedural requirements of the IDEA; and (2) develop for each disabled student an IEP that is reasonably calculated to enable the child to receive educational benefits. *Heather S.,* 125 F.3d at 1054. "Once the school district has met these two

requirements, the courts cannot require more; the purpose of the IDEA is to 'open the door of public education' to handicapped children, not to educate a handicapped child to her highest potential." *Board of education of Muphysboro Community Unit School. Dist. No. 186 v. Illinois State Bd. Of Educ.*, 41 F.3d 1162, 1166 (7th Cir.1994). Therefore, a school district has met the substantive requirements of the IDEA if the proposed placement is "reasonably calculated to be of educational benefit to the handicapped child." *Heather S.*, 125 F.3d at 1054 .; *Massachusetts v. Department of Educ. Of Massachusetts*, 471 U.S. 359, 370 (1985).

Recognizing that parents and school officials may not always agree on what constitutes an appropriate education for a handicapped child, Congress instituted an elaborate set of procedural safeguards into the IDEA in order to insure the full participation of parents and the proper resolution of substantive disputes. *Burlington*, 471 U.S. at 368. Consequently, as in the present case, where a parent is dissatisfied with the IEP developed by the school district for her child, the Supreme Court has provided that the parent may, at her own financial risk, unilaterally place her child in a private school. *Burlington*, 471 U.S. at 370. If a federal court later determines that: (1) the student was in need of special education services; (2) that the IEP developed by the school district was inappropriate; (3) that the unilateral placement by the parent was proper; and (4) the cost of the private education was reasonable, then the court may order reimbursement for the parents. *Four v. Carter*, 510 U.S. 7, 12 (1993).

B. Count I--Review of the Level II Hearing

1. The District's IEP

There is no dispute that Dale was in need of special education services, consequently, this court must first address whether the IEP developed by the District for Dale was

inappropriate. The Court finds that a preponderance of the evidence establishes that the District's proposed placement for Dale was inappropriate.

It is undisputed that when Dale was in the Coop from September of 1994 until January of 1995, he almost never attended. Indeed, he was present at school for only 20 days and became heavily involved in substance abuse. This truancy occurred despite his mother's efforts to transport him to school and her efforts to involve the truant officer. Notwithstanding these facts, the District's January 17, 1996 IEP is almost identical to the IEP which proved so ineffective when Dale was originally placed into the Coop. Most importantly, the new IEP did nothing to address Dale's problem with truancy. Only one reference was made to truancy. That reference states that SAS counseling was to be used to assist Dale with his truancy. However, the IEP nowhere explained what SAS counseling was, what it's objectives and goals were, or how such counseling would improve Dale's attendance problems.

The reviewing officer did not address this failure to sufficiently address Dale's Truancy problems, but instead stated that Dale's conduct cannot convert an otherwise appropriate placement into an inappropriate one. However, the Court finds Dale's conduct to be central to a proper determination of an appropriate placement. Dale's handicap is a *conduct* disorder. The very reason he is covered by the IDEA is because of his inability to manage his conduct. Repeated evaluations have concluded that he does *not* have a learning disorder, but instead a conduct disorder. Consequently, the District's failure to address how his disability impacted his conduct regarding attendance resulted in a deficiency in their IEP.

The Court notes that its conclusion might have been different if not for two critical facts: (1) the failure of the District to effectively modify the previous IEP; and (2) Dale's

history under the pervious IEP. When formulating the January 17, 1996 IEP, the District had the benefit of knowing how Dale responded to his previous placement. The District had no such benefit of "hindsight" when formulating the September of 1994 IEP. However, knowing that the District's September of 1994 IEP failed to confer an educational benefit upon Dale, when given an opportunity to modify the IEP in January of 1996, the District did not. His conduct regarding attendance was almost entirely ignored.

In sum, this Court finds that the District's proposed January 17, 1996 placement was inappropriate because: (1) the District's IEP did not effectively address Dale's attendance problems; and (2) the District's IEP had previously been shown to be inappropriate through Dale's lack of attendance.

2. The Residential Placement

Having found the District's proposed placement inappropriate, the Court must next address whether Dale's placement at Elan was appropriate. Again, this Court disagrees with the reviewing officer's conclusion that Elan was inappropriate. Consequently, the Plaintiffs are entitled to summary judgment on this issue as well.

The reviewing officer stated that the appropriateness of a residential placement for Dale was "questionable in view of the lack of any real improvement in Dale's condition after 4 months of residence." However, the officer also noted that Dale was doing well academically at Elan because the 24 hour structure kept him in school.

This Court finds that a preponderance of the evidence shows that Elan is an appropriate placement for Dale. While it is true that Dale was uncooperative during the initial months of his placement at Elan, the expert testimony indicated that an

adjustment period is ordinarily required for new students. Moreover, Dale's *academic* performance was good from the very beginning at Elan. Indeed, the evidence presented shows that throughout Dale's stay at Elan, he has received excellent grades and reports in all of his classes. Finally, his attendance has been perfect. It is therefore undisputed that *academically,* Dale is receiving an educational benefit from Elan.

Moreover, the District's evidence is insufficient to rebut the Plaintiff's expert opinion that a residential placement for Dale is appropriate. The District presented the testimony of the District personnel who prepared Dale's IEP. These witnesses testified that they believed Dale could receive an educational benefit from the Coop and that a residential placement was too restrictive. However, these witnesses were the very same people who failed to address Dale's truancy in the second IEP. Indeed, these witnesses were the same people who failed to make *any* real changes to Dale's January 17, 1996 IEP although they were aware of his abysmal performance under the original IEP.

The Plaintiff presented the expert testimony of Mr. Yahr. Mr. Yahr submitted a detailed, 17 page report delineating the tests he performed on Dale, his observations of Dale, his summary of Dale's condition, and his recommendations regarding Dale. Mr. Yahr concluded that "[w]ithout the structured supervised setting of residential placement [Dale] would not be appropriately participating in the educational setting." Consequently, Mr. Yahr recommended for Dale "[c]ontinued placement in a residential setting that has as its focus immediate accountability of actions, and continuously draws the distinction between behavior and the individual."

Not only did the District present nothing to sufficiently rebut the Plaintiff's expert witness, Dale's performance at Elan has proven that expert's conclusions essentially correct. As noted above, Dale's academic performance has been

consistently good while at Elan. Consequently, the Court finds that a preponderance of the evidence shows that Elan is an appropriate placement for Dale. The Plaintiffs are therefore entitled to summary judgment with respect to the issue of Dale's placement.

3. The Independent Evaluation

The Plaintiff's also appeal the Level I and Level II conclusion that the District was not obligated to have an independent evaluation of Dale performed. The Parent contends that in addition to having a conduct disorder, Dale has a learning disability as well, and an independent evaluation should have been conducted to determine the extent of Dale's learning disability. Both levels of administrative review concluded that the District acted appropriately in not responding to the Parent's request for an independent evaluation because sufficient diagnostic material was available and the court appointed psychologist's independent evaluation sufficed.

The Court agrees that another independent evaluation was unnecessary. At the time of the Parent's request for an independent evaluation, Dr. Baukus had already recently conducted an independent evaluation based on a court order. Furthermore, the parents own independent evaluation conducted by Mr. Yahr came to the same conclusion as Dr. Baukus's evaluation--namely, that Dale does not have a learning disability. Consequently, the Court finds the District acted properly in refusing to have another independent evaluation performed.

C. Count II--The Rehabilitation Act of 1973

Count II of the Plaintiffs' complaint alleges that the District committed numerous acts in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*.

However, it is axiomatic that a party opposing summary judgment must present evidence which shows that there is a genuine issue of material fact in dispute. Fed.R.Civ.P. 56(e). The Plaintiffs not only fail to address this count in their memorandum of law, but they also fail to present evidentiary facts to oppose summary judgment on this count. Consequently, the Defendants are entitled to summary judgment on Count II.

D. Count III--Section 1983

Count II of the complaint alleges that the District violated Dale's Fourteenth Amendment rights. Specifically, the complaint alleges that the Defendants failed "to provide [Dale] with an appropriate education program pursuant to the IDEA, and ...fail[ed] to provide required accommodations and modifications for him pursuant to Section 504]. However, a Section 1983 violation must be "premised on the fact that a defendant has committed a legal violation pursuant to a custom or with recklessness or callous indifference." *Monticello School. Dist. No. 25 v. George L. on behalf of Brock L..*, 102 F.3d 895, 904 (7th Cir.1996). The Plaintiffs' Section 1983 allegations contain no references to a custom or callous indifference. Consequently, the Defendants are entitled to summary judgment on Count III as a matter of law.

E. Attorney Fees

In Count I, the Plaintiff requests attorney fees pursuant to the IDEA, 20 U.S.C. § 1413(e)(4). This section provides that "the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents ... of a child or youth with a disability who is the prevailing party." 20 U.S.C. § 1413(e)(4). Given that the Plaintiffs have prevailed on their IDEA claim regarding Dale's placement, the Court grants the Plaintiffs reasonable attorney fees.

III. Conclusion

Based upon the foregoing, the Court finds as follows:

(a) The Plaintiffs' Cross-Motion for Summary Judgment [# 29] with respect to Count I of the complaint is GRANTED in part, and DENIED in part. Specifically, the orders of the Level II reviewing officer are reversed except that portion affirming the Level I hearing officer's determination that the Parent's request for an independent evaluation and reimbursement for such a private evaluation is denied. Consequently, the District is to assume financial responsibility for the costs of educating Dale at the Elan School in Poland, Maine and the Parent is entitled to reimbursement of the costs for educating Dale at the Elan School in Poland, Maine since his placement there. The Defendants' Motion for Summary Judgment [# 9] with respect to the above issues is therefore DENIED in part, and GRANTED in part.

(b) The Plaintiffs' Cross-Motion for Summary Judgement [# 29] with respect to Count II is DENIED, and the Defendants' Motion for Summary Judgment [# 9] with respect to Count II is GRANTED;

(c) The Plaintiffs' Cross-Motion for Summary Judgment [# 29] with respect to Count III is DENIED, and the Defendants' Motion for Summary Judgment [# 9] with respect to Count III is GRANTED;

(d) The Plaintiffs' request for attorneys' fees and costs pursuant to 20 U.S.C. § 1413(e)(4) as the prevailing party is GRANTED. The Plaintiffs have fourteen (14) days from the entry of this order in which to submit an affidavit detailing reasonable attorneys' fees and costs, and the Defendants' have fourteen (14) days in which to object to the Plaintiffs' submission.

ENTERED this 15th day of June, 1998

s/ Michael P. McCuskey
Michael P. McCuskey
U.S. DISTRICT JUDGE

APPENDIX D - OPINION OF ILLINOIS STATE BOARD OF EDUCATION LEVEL II REVIEW OFFICER ARTHUR MEDOW DATED JULY 25, 1996

Case No. 96-013

ILLINOIS STATE BOARD OF EDUCATION
LEVEL II REVIEW

In re: Special Education of Dale M.

and

Bradley-Bourbonnais Community
High school District No. 307

OPINION

This is an appeal by the High School district from the decision of the Level I Hearing officer declaring the unilateral enrollment of Dale M. (DM) by his Parents in Elan, a residential school in Maine, an appropriate placement and ordering the District to assume financial responsibility for it. The Parent appeals the denial by the hearing officer of her request for an independent evaluation. Both parties requested oral argument.

After due consideration of the oral argument and the record made prior thereto, the reviewing officer reverses the hearing officer's ruling and holds that Elan is not an appropriate placement and that the District is not obligated to pay for educating DM at Elan. The ruling denying the Parent's request for an independent evaluation is affirmed.

BACKGROUND

DM is presently a 17 year old male student who has been residing with his mother after his parents were divorced a number of years ago. He is presently diagnosed as being behavior disordered with substantial involvement in drugs and alcohol.

DM became a student at the District in fall, 1993, at age 14. He had disciplinary problems in his first year. His teachers complained that his misconduct disrupted the class. He would frequently walk out of school and cut a number of classes.

An MDC was held in December 1993 to consider a remedial program. However, the MDC's recommendations were not implemented, because DM transferred to Watseka High School when he moved there to live with his father. He attended Watseka for a semester, and returned to the District in fall, 1994.

An MDC was conducted in September 1994, and it placed DM in the Kankakee Coop Therapeutic Day School. The Coop has self-contained classrooms with up to 13 students. There is a certified teacher and a program assistant for each classroom. The school day is from 8 AM till 1PM; if the student does not complete assignments, the student will stay till 3PM to complete them. The shortened day was developed as part of a comprehensive behavior modification and management system for behavior disordered students; they can handle a shortened day better than an extended one. The school had time-out rooms where students who became disruptive could cool off. The program provided counseling by a social worker and a community service (SAS) that was designed to help DM overcome his refusal to get out of bed and go to school. Breakfast and lunch were served at school.

DM attended classes at the Day school for only 20 days during the period September 1994 to January 10, 1995. During

these 20 days he turned in his assignments, received good grades, and did not have any major behavior problems.

For some time, DM had been drinking alcohol excessively and had been taking addictive drugs. On January 10, 1995, DM was hospitalized in the Riverside Medical Center for a major depressive disorder. At the time he was being charged with residential burglary and theft of a car. After two days in the hospital he was placed on a Partial Hospitalization Program which provided academic instruction. DM received A's and B's for his class work. He was discharged from the program on February 3, 1995. On March 21, 1995, DM was placed on probation for the aforementioned criminal activity.

DM refused to return to the Day School Program in spring 1995. At the request of the Parent, DM was given home bound instruction. He continued on home bound until November, 1995. At that time DM was charged again with residential burglary and sent to jail.

Evidently, in response to the Court's interest in what were the long range plans for a residential placement for DM, the Parent requested the District to conduct an MDC by January 4, 1996, in order to consider a residential special education placement for DM. The District had difficulty completing the case study necessary to support such a placement because of DM's incarceration.

Nevertheless, a hastily convened MDC was held on January 17, 1996. The conference report stated DM's academic achievements were at or above grade level 12. It noted that DM had low self esteem and depressive feelings. In evaluating the placement options for DM, the MDC also considered the psychological report of Dr. Baukus (District Exs. 83-94 incl, 77-B), the Behavior Report of the Detention Officer of Champaign County Youth Detention Center (District Exs. 81-

82) and the December 11, 1995, letter of Dr. Lam (District Ex. 79).

The judge handling DM's case ordered an examination and psychological assessment of DM. Dr. Baukus, a licensed clinical psychologist with the Human Resource Development, made the evaluation and submitted a report on December 21, 1995. It stated that in the past year DM has used LSD, marijuana, cocaine, and opium. DM told Dr. Baukus he was a daily user of marijuana and drank 8 to 12 cans of beer daily. Although the court had ordered him in Spring 1995 to complete the Riverside program as part of his probation, he did not comply. There were no sanctions for non-compliance. DM supported these habits to some extent by pawning or selling family and personal belongings.

Dr. Baukus tested DM for attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder (ADHD) and found no basis supporting a diagnosis that DM had either of these medical problems. DM's actions appear to be symptoms of Conduct Disorder.

Dr. Baukus did not find that DM had a learning disability. DM's reading skills were at the high school grade level; in arithmetic DM scored at the post high school grade level.

Dr. Baukus found that DM's problems with alcohol and drugs are more serious than mere abuse. A number of signs point toward DM's dependence on both of these substances. DM has demonstrated a lack of insight into his addiction by continuing to drink alcohol and use drugs.

The chronicity of the conduct disorder and the level of chemical dependency indicate that DM needs long term in-patient treatment in a highly structured setting. The need for

inpatient treatment is supported by failures in DM's case less restrictive treatment (District Ex. 94).

Subsequent to the issuance of this report Dr. Baukus was notified that DM was taking medications prescribed by Dr. Lam for ADD and depression. The hearing officer ruled that the administration of the medication did not establish the presence of ADD or ADHD, since Dr. Lam's letter of December 11 did not contain the clinical data or the results of tests to support the prior diagnosis of ADD or ADHD (Level I Opinion P.4). The ruling was not appealed.

The Behavior Report of the Detention Officer stated that DM's behavior, attitude, and academic progress has improved. Nevertheless, DM received restrictions for misconduct on a number of occasions He was placed on suicide watch on three different occasions due to verbal threats of suicide.

The report concluded: The minor has failed to display a consistent ability to function appropriately in a secure detention.

The MDC concluded that a residential placement for DM was too restrictive and recommended he be enrolled in the Coop Day Program which provided behavior management and control.

Immediately after the MDC the Parent requested a due process hearing. On January 23, 1996, before the hearing was held, the Parent obtained DM's release from jail and placed him at Elan School in Poland, Maine, which is a residential school, approved by the Illinois State Board of Education. The Court placed DM on probation until July, 1996.

DUE PROCESS HEARING

At the Level I hearing the Parent called Mr. Yahr, a psychological examiner licensed in Maine, to testify by telephone The District objected to this offer of testimony, but the hearing officer permitted it to be presented, subject to being subsequently disregarded. Mr Yahr stated he had not tested or evaluated DM, and was only offering his impressions on the basis of an interview of DM the previous evening. DM told him that he did not like Elan, but recognized he did not have any other choice. He was worried about going back to the detention center (Level I Transcript 152-3). At the conclusion of Yahr's testimony, the hearing officer ruled it was inadmissible and stated he would disregard it. Among the reasons given by the hearing officer for the ruling were: It added nothing new to our discussions that have already been under way (Lever I Transcript 165). At the oral argument on appeal, the District withdrew its objection to Yahr's testimony and requested it remain in the record. The request was granted.

Dr. Sapan, the clinical director of Elan, also testified by telephone. He said the Elan program has three components: life skills, counseling, and school classes. Morning's are devoted to life skills which consists of work in the kitchen, in the office, or clean up of the school premises. Counseling sessions were held in the afternoon, and school classes were held in the evening from 6:30PM to 10:30PM. Little or no time was set aside for homework during the week.

The hearing officer stated: "Telephone conference presentation by J.S. (Sapan) was relevant, but could be disregarded given the preponderance of oral testimony by other witnesses and the case record." (Level I Opinion p. 2).

The record contains a report sent to the Parent in February by a case worker at Elan, stating that DM's participation in counseling group sessions was oppositional.

The report added that DM was not accepting the Elan program and was refusing to participate in the program in any meaningful way.

There was no evidence concerning the educational program devised by Elan for DM. Elan had not yet prepared an IEP..

The hearing officer found that Elan was an appropriate educational placement for DM and that the Kankakee Co-op Day Program was inappropriate. He found the Day Program inadequate to serve DM's needs, since DM was not capable of managing his free time without getting into trouble. The open setting of the Day Program could not contain DM. He noted that DM had flatly stated he would not return to the Day Program. The hearing officer concluded that the placement of DM in the Day Program "would certainly have the ultimate effect of excluding DM from school and thereby denying him a FAPE." (Level I Opinion p.4).

In reliance upon the Supreme Court decision in School Committee of the Town of Burlington v. Dept. of Education, 471 U.S. 359 (1984), the hearing officer ruled that the Parent had a right to unilaterally withdraw DM from what she believed was an inappropriate setting and place him in an appropriate facility. It should be noted that the Parent withdrew DM from jail, not from what the Parent believed was an inappropriate educational setting provided by the District. The hearing officer ordered the District to pay the cost of maintaining DM at Elan for one year.

The hearing officer's conclusion is erroneous. There is no evidence in the record to support the finding that Elan is an appropriate educational placement for DM. The only information in the record concerning Elan is that it is a residential school approved by the Illinois State Board of

Education. The only witnesses who might have had knowledge of Elan were Yahr and Sapan. However, as noted above, the hearing officer ruled that he would disregard their testimony.

There is certainly no showing that attending school classes at Elan from 6:30 p.m. to 10:30 p.m. is a preferable education experience to attending classes at the Day School Program from 8:00 a.m. to 1:00 p.m. The Parent has not established either the educational or therapeutic value of Elan's assigning to students household clean-up chores for most of the morning.

The February report of the Elan case worker (Parent Ex. 87) does not indicate that DM is benefiting from the Elan program. He had lost all status and privileges for his defiant, belligerent attitude.

There is nothing in the record, made by witnesses whose testimony was accepted by the hearing officer, that discloses what Elan would do for DM's behavior disorder and heavy involvement in alcohol and drugs.

The ruling that Elan is an appropriate placement appears to rest on the assumption that Elan will benefit DM by supervising his activities throughout the day, thus preventing the engagement in anti-social behavior outside school walls. Approval of a placement of DM at Elan at the expense of the District for this purpose is erroneous, since the District is not required to provide custodial care after school hours in order to control conduct during after school hour. St. Charles Community School District No. 303, 19 IDELR 552, 556 (Level II Ill. 1992).

There is no educational need for such a restrictive placement. The numerous tests that have been administered to DM by the District and the court-appointed psychologist do not

indicate that the behavior disorder has impaired DM's intellectual capability to process educational material. He has been found to be at or above grade level in most subjects. Evaluators have considered him bright. The hearing officer had correctly ruled that DM is not impaired by a learning disability or ADD/ADHD. (Level I Opinion B).

None of the professionals who testified, or whose reports were considered, recommended a residential placement for educational reasons; their recommendations were for medical placements. Dr. Baukus questioned whether a mere structured setting without treatment for chemical dependency would significantly change DM's life pattern. In his opinion, "the chronicity of the Conduct Disorder and the level of chemical dependency indicate a long term inpatient treatment in a highly structured setting is needed." (District Ex. 93-94)

Dr. Lam, M.D. who had treated DM for a variety of medical problems submitted a four paragraph letter which stated: "[DM's] difficulties could be best dealt with by long term residential placement where he could receive intensive ongoing treatment and supervision."

The Parent did not present any evidence other than her own testimony that a residential placement was appropriate for educational reasons.

DM's refusal to attend the Day School Program cannot dictate his school placement. DM's voluntary acts of truancy and his refusal to get up in the morning to go to school do not make an otherwise appropriate placement an inappropriate one. It is apparent that the untreated substance abuse impedes the ability of the District to educate DM. However, substance abuse is not a handicap of the type that is remediable with services funded under the Special Education provisions of 23 Ill. Administrative Code, Subtitle A Part 226. The substance

problem is a medical problem. The District has an obligation to provide educational benefits, not to cure substance problems.

Under the Supreme Court decision in Rowley, the District is not required to maximize the potential of DM. The free appropriate public education which the District is required to provide DM is to be embodied in a program that will confer some educational benefit on DM. Board of Education v. Rowley, 458 U.S. 176, 189, 199-201(1982). As noted above, DM did not give the Day School Program recommended by the District a chance. He refused to attend the school. There is no basis to conclude that the Day School Program could not confer educational benefits on DM and is therefore inappropriate.

The facts of this case are similar to those in the St. Charles case cited above. There, too, the parent sought residential placement for a student who had substance abuse problems. The Level I hearing officer granted the request. The reviewing officer reversed the ruling, stating that although a residential placement might be the "best" program for the student, the District's proposal of a private day school was sufficient to provide some educational benefit to the student. He noted in a well reasoned opinion that the hearing record failed to demonstrate that the student's substance abuse was attributable to the District in any way; it was therefore an error to assign to the District the total responsibility for the student's behavior problems. The reviewing officer's decision was affirmed by the court. Blickle v. St. Charles Community Unit School No. 303, 20 IDELR 167 (ND. Ill. 1993).

The reasoning of the reviewing officer in the Blickle case is equally applicable to DM's case and justifies the reversal of the hearing officer's decision permitting the placement of DM at Elan.

The Parent cited Seattle School District No. 1 v. BS, 24

IDELR 68 (USCA, 9th, 1996) in support of her contention that Elan should be found to be an appropriate placement. That case involved a student that had various emotional and behavioral disabilities, none of which included substance abuse. Several of the student's doctors testified that a residential placement was appropriate for the student. On the other hand, the school district's evaluation team did not include anyone who was familiar with the student's disorders. In DM's case there was no evidence presented by the Parent that any professional had recommended a residential placement for educational purposes; recommendations for residential placement were for facilities that could render long term treatment for chemical dependence.

LEVEL II HEARING

The District appealed the hearing officer's ruling that Elan was an appropriate placement for DM. The Parent appealed the denial of a request for an independent evaluation to assess DM's possible learning disabilities.

Appropriateness of Elan Placement

In accordance with 23 Ill. Adm. Code Sec. 226.688(b), the Parent was allowed to introduce at the Level II hearing additional testimony by Mr. Yahr, Dr. Sapan, as well as Yahr's May, 1996 report of his evaluation of DM. The reviewing officer will determine whether or not this evidence requires any revision of his foregoing determination that the hearing officer's decision regarding the appropriateness of the Elan placement should be reversed.

Mr. Yahr, a psychologist, conducted a psychological and educational evaluation of DM four months after DM entered Elan. He submitted a report in which he stated that DM's behavior is consistent with ADD and Depression as well as with Conduct Disorder and Substance Abuse Dependency

(Parent Ex. A-16). At the hearing on June 17, 1996, Yahr stated unequivocally that DM has ADD (Level II Tr. 28). Yahr's report and testimony did not refer to any tests he may have made to establish an ADD diagnosis. These comments by Yahr concerning ADD are not conclusive to dispute the findings and conclusion of Dr. Baukus that DM did not have ADD at the time he examined him and to overturn the hearing officer's ruling that DM did not have ADD (Level I Opinion, Page B).

Mr. Yahr recommended a residential placement and said that without the structured supervised setting of such a placement, DM would not participate appropriately in the educational setting (Parent Ex. A-16).

However, the appropriateness of the residential setting for DM at Elan is questionable in view of the lack of any real improvement in DM's condition after 4 months of residence. The Elan staff counselor's report submitted by Ms. Emerson to the Parent on April 29, 1996, stated that DM admits he does not do anything to change his situation. He wastes time in the program by fooling around. He gets involved with other residents who are not committed to doing well in the program.

Yahr testified that DM stated he just sat in on the counseling sessions and didn't want to talk about his feelings. (Level II Tr. 34-36)

Dr. Sapan, the clinical director, stated that the aforementioned comments of Ms. Emerson were still true. (Level II Tr. 52) He also stated that if DM were placed in a day school program that ended at 1:30 in the afternoon, DM would not be in school, and he would get deeply involved into chemicals (ID, 54-55). Sapan concluded DM was getting good grades academically at Elan, because the 24 hour structure keeps him in school.

The testimony of these two witnesses does not support a conclusion that a residential placement at Elan is necessary, or even appropriate, for educational reasons. The residential placement at Elan appears to be for the purpose of preventing truancy and the involvement in drugs and alcohol. These objectives do not justify the expenditure by the District of special education funds.

The prior determination by the reviewing officer that the placement at Elan is not appropriate for DM is reaffirmed.

Independent Evaluation

In denying the Parent's request for an independent evaluation, the hearing officer stated that he regarded the report of Dr. Baukus, which the Parent had provided to the District, to be an independent evaluation sufficient to meet the needs of the Parent. He characterized the report as "one of the finest and most complete evaluations [he] had had the privilege of reviewing. (Level I Opinion, p.3)

At the Level II hearing the Parent requested reimbursement for the evaluation made by Yahr after the Level I hearing was held. The Parent contended the evaluation was needed because the District failed to assess DM's possible learning disabilities. (Parent's Notice of Appeal). The request for reimbursement is denied.

In the first place, the District must pay for an independent evaluation only if its evaluation is shown to be inappropriate (23 Ill. Adm. Code 226.544(b)(3). The evaluations of the District and of Dr. Baukus concluded DM did not have a learning disability. Yahr did not contradict those evaluations.

Secondly, Yahr, a psychologist licensed in Maine, does

not qualify to serve as an independent evaluator at the expense of Illinois, since there is no showing that he is on the list of independent evaluators maintained by the Illinois State Board of Education, who are qualified to perform evaluations at public expense (23 Ill. Adm. Code 226.544(e)).

Participation of Other Agencies
in Funding Residential Placement

Parent contends that the District was required to invite representatives of appropriate state agencies to attend the MDC when a residential placement is contemplated for reasons other than education (23 Ill. Adm. Code Sec. 226.420(c)). The Parent raised the issue at the level I hearing, but did not present evidence demonstrating the agencies that should have been invited. The hearing officer pointed out that the court, which is mentioned in Sec. 226.420(c), did not have funds to pay for the placement. (Level I Tr. 233-36)

The Parent's Notice of Appeal did not list this point as an issue to be considered on appeal. The Parent's brief did not discuss this point. It would appear that issue, if there is one, was waived by the Parent.

At the Level II oral argument the Parent referred again to the failure of the District to invite other state agencies. (Level II Tr. 75-77). The District responded to this point in its RepLy BriefE. 7), flied after the hearing The District stated that the court system, referred to in Sec. 226E42O(c), had reftscd to participate in any financial way for DM. At this point, the Parent's concern about the participation of other state agencies is moot.

Statute of Limitations

The District requested in its Reply Brief (pages 1-2) that

all facts cited by the Parent in her brief prior to January 5, 1994 be stricken as being barred by the statute of limitations. Facts cited by the parent in her brief were referred to in testimony and exhibits presented at the Level I hearing. The District did not object at the hearing to the introduction of any of this evidence. The request to bar evidence as being beyond the statute of limitations is denied.

In considering the evidence introduced, the reviewing officer attributed to the District only those facts that occurred after DM entered the high school.

Order

After due consideration of the record, briefs, and oral argument, it is ordered:

1. That the Elan School is not an appropriate educational placement for DM and that the District is not financially responsible for the Parent's unilateral placement.

2. That Paragraphs 1, 2 and 3 of the Level I hearing officer's order are hereby reversed and deleted in their entirety.

3. That Paragraphs 4 and 5 of said Order are affirmed.

4(a). If the Parent elects for DM to return to the District for education, Parent shall so notify the District within 10 days of receipt of this Order.

4(b) If Parent notifies District that DM will return to the District, District shall convene an MDC to develop an IEP for DM within 15 days after receipt of the aforementioned notice, or such later date upon which the District and Parent agree.

Respectfully submitted,

s/ ARTHUR MEDOW
Reviewing Officer

Date _____

APPENDIX E - OPINION OF ILLINOIS STATE BOARD OF EDUCATION HEARING OFFICER MILTON NIDETZ DATED MARCH 24, 1996

BOARD CERTIFIED DIPLOMATE/LICENSED CLINICAL SOCIAL WORKER
MILTON NIDETZ, M.S.W
OLD ORCHARD PROFESSIONAL BUILDING
64 OLD ORCHARD SUITE 506
SKOKIE, ILLINOIS 60077

(847) 673-7474

LEVEL I IMPARTIAL DUE PROCESS HEARING DECISION

1.	Student:	Dale M. (dob: 6/5/79)
2.	Requesting Party:	Mrs. Alice M., parent
3.	Responding Party:	School District #307 Bradley-Bourbonnais Community High School
4.	Hearing Officer:	Milton Nidetz, M.S.W.
5.	Date of Hearing:	March 22,1996
6.	Date of Decision:	March 24,1996

7. Witnesses for the Requesting Party (parent):
Everett J. Quigley, Case Manager
Greggus Yahr. Psychology by Phone;
Testimony ruled as inadmissible by Hearing Officer
Dr. Jerry Sapan, Clinical Director of Elan School by

phone
Sally Beard, School Educational Diagnostician
Walter Wall, Guidance Counselor
Mrs. Alice M., Parent
Ing-Ing Lam, M.D., excused by parent's attorney as unavailable and not called.
Margaret Davidson, Social Worker, unavailable and decision to defer subject to call if needed; not called.
Janet Green, Psychologist, no longer employed by District. Request for testimony dropped.

8. Requesting Party (parent) represented by attorney:
Margie Best, Esq.
One North LaSalle Street, Suite 2200
Chicago, IL 60602
(312) 263-4040

9. Witnesses for the Responding Party
(School District #307).
Bernadette Henriott, Principal of Kankakee Co-Op Center
Andy Furbee, Teacher Co-Op Center
Charles Parsons, Director of Special Education and School Psychologist

10. Responding Party (School District #307)
Represented by Attorney:
John Relias. Esq.
300 South Wacker Drive, Suite 3400
Chicago, IL 60606-6785
(312) 786-0300

11. Summary of Issues in Dispute and Findings:

The School District, through their attorney. maintained

that they had an appropriate school placement via the Kankakee Co-Op Day Program, designed an IEP that they believed would serve this student in the least restrictive environment; and would augment related services to attempt to maximize parental responsibility to assure the student's attendance at the Day Program. The District argued that for the period of 20 days that he was in attendance, September 1994 through January 1995, he was reported as doing satisfactorily. The District also maintains that the purpose of the unilateral parental placement at Elan School (a residential placement) was for the purpose of avoiding his incarceration and not seeking educational purposes. The School District further maintained that the parent's request for an independent evaluation was unnecessary - given that school personnel had done their own evaluation and had in hand, in preparation for their latest I.E.P., the independent evaluation of the court appointed psychologist, provided to the School District by the parent.

The parent's position argued by their counsel, was that the School District's proposed Day School placement was totally inadequate, provided only a shortened day and their Behavior Management Program would most likely produce the student's expulsion from school as he tested and/or manipulated the Program. It was argued that the Day Program expected of the student initiative he'd already demonstrated he could not maintain, and that given his previous lack of attendance at the Co-Op program had already proven that his severe behavior problems made him unable to benefit from that program. The parent's position is that she had to act, making an unilateral placement at a State approved Residential School, maintaining that was what the student required, and after the District failed to act. The parent also pressed the issue that the School District did not respond to her request for an independent evaluation.

The Hearing Officer ruled that:

1. The proposed School District's Day Program is inadequate to serve the needs of this severely Behavior Disordered and Substance and Alcohol involved student;

2. The Diagnostic profile confusion is clarified, and rules out previously suggested Learning Disorders, Attention Deficit Disorder, and is now very specifically focused as above;

3. The Elan School (a State approved) Residential School, is an appropriate placement and the student's initial adjustments are typical to the situation;

4. That the parent acted appropriately in making this Residential Placement and that the School District shall be financially responsible for such placement effective January 1996 and through January 1997.

5. That the School District, shall initiate, in cooperation with Elan School, a new IEP - recognizing the realities of residential placement and incorporating the educational objective and goals of Elan.

6. The School District was appropriate in not responding to the parent's request for an independent evaluation, given that sufficient diagnostic material was available and used in fashioning the IEP of 1/17/96; and that the court appointed psychologist's independent evaluation sufficed.

7. That the School District pay transportation costs of the student for his initial trip to Elan and for his return trip at the end of his stay at the Residential School.

LEVEL I IMPARTIAL DUE PROCESS HEARING DECISION
DALE M. (dob: 6/5/79)

On Friday. March 22, 1996 at 9:00 E a Level I Impartial Due Process Hearing was convened on behalf of Dale M. at Bradley-Bourbonnais High School #307, 700 West North Street, Bradley, IL 60915.

The hearing officer has jurisdiction to hear and decide this matter under Section 14-8.02(g) of the School Code, 34 CFR 300.506-509 of the P.L. 101-476 Regulations, and 23 Illinois Administrative Code 226 Subpart J.

The parties were informed of their rights under Section 14-8.02(g) of the School Code, 34 CFR 300.508, and 23 Illinois Administrative Code 226 Subpart J.

This hearing was requested by the parent. The timeliness of the hearing delineated in the above-referenced rules were extended to meet scheduling requirements of significant parties.

The issues presented before this hearing officer by the parties were:

a) The parent contests the District's Day School placement and requests the District's acceptance and financial support of her unilateral Residential Placement;

b) The parent's contention that the District failed to honor her request for an independent evaluation; and

c) Confusion and disagreements about an evolving diagnostic profile.

Pre-Hearing Procedural Issues/Structural Issues

In a telephone conference call on 3/19/96 between attorney for the School District, attorney for parent and this Hearing Officer, several issues were raised and responded to as follows:

1. Regarding witnesses, School District attorney advised that J.G.. was no longer employed by the District and parent's attorney excused her; Social worker M.D. would be on a long planned field trip and it was agreed that she would be on call by phone if it was deemed necessary to call her - it became unnecessary to call her.

2. School District attorney raised objection to having two witnesses available by telephone conference call only - citing no time to prepare cross examination and in violation of rules of Discovery. Hearing Officer expressed curiosity to hear what those two witnesses might have to say, inasmuch as they both have had the latest contact with student and H.O. would rule retrospectively on their testimony. During the course of the hearing subsequent to G.Y.'s presentation Hearing Officer ruled his material as inadmissible. Telephone conference presentation by J.S. was relevant, but could be disregarded given the preponderance of oral testimony by other witnesses and the case record.

3. School District attorney raised issue of the 5 calendar day disclosure requirement, stating he had not received the parent's case material/witness list until Saturday, March 16, 1996. Hearing Officer ruled that having received both District's and Parent's material on that same day (3/16/96) he was satisfied that both had met the minimum requirement of the 5 days.

4. It was decided that the School District bearing the burden, would present their case first.

5. It was farther decided on request of parent's attorney that hearing would be closed and witnesses would be excluded.

6. During the course of the proceedings, Hearing Officer ruled that School Psychologist need not turn over his test protocols, that they were his private papers and both he and the School Diagnostician were available for examination on their methods and conclusions and their written material was part of the case record.

Background

D.M. attended his first semester of his freshman year at Bradley-Bourbonnais Community High School; and the second semester at Watseka High School, at the point that he went to live with his father. Apparently, in this first year of high school he was diagnosed as LD - so that he could have the support of the Resource Program. He is reported as doing well at Watseka, still inattentive; and failing all his subjects.

For the 1994/95 school year, his sophomore year, he returned to BBCHS, started in the School Resource Program. He lasted only a few weeks, would habitually walk out of school, wouldn't stay, would act out, and earned in school suspensions.

The IEP of 9/23/94 mentioned a "ADD Profile," considered him BD category and he was placed in the Day Program at Kankakee Co-Op, where he attended only 20 days, although for 19 of them he successfully controlled his in-school behaviors.

For a two day period. 1/10/95 to 1/12/95, he was hospitalized at Riverside Medical Center in Kankakee, on the psychiatric unit. Upon discharge he was enrolled in the hospital's Partial Hospitalization Program and following that, upon mothers request, placed on Homebound Instruction as per the IEP of 2/20/95.

No school services were provided over the summer.

Fall of 1995, first semester 1995/96 (his third high school year) again has him enrolled in the Homebound Instruction Program. It is also demonstrated that D.M. is not capable of managing his free time without getting into trouble.

A series of 'brushes with the law': 1) in Spring of 1994 for Residential Burglary, trespassing, and stealing a friend's car; and 2) in November 1995 he's charged with Residential Burglary... brings him to the attention of the court, and he's incarcerated in Juvenile Detention for the period 11/7/95 - 1/12/96.

The court ordered a psychological examination to aide it in its judgment, and the court appointed psychologist prepared a comprehensive psychological assessment dated 12/21/95. That report singularly attempts to clarify the various diagnostic labels/categories with more complete information and testing. It rules out: Learning Disabled, ADD/ADHD and Major Depression Disorder, and pinpoints the diagnosis as Conduct Disorder (educationally Behavior Disordered) with the concomitant disorders of alcohol and cannabis dependence.

Parent points out that the previously attempted Kankakee Co-Op Program didn't work, failed to contain the student in class: and he needs external controls to potentially succeed in learning.

Mother continues to raise diagnostic issues, claiming D.M. suffers from ADD and depression. His abuse of drugs and alcohol is freely acknowledged by the student.

Although the mother signed the IEP of 1/17196, which proposed the placement at Kankakee Co-Op Program, parent objected, felt that the placement wasn't suitable and was compelled to make her own unilateral placement at a Residential School.

The School District maintained that their proposed placement was appropriate. He had done well at the Co-Op Program when he attended, and they would fashion ancillary and related services to enable the mother to assure his presence at school. They believe the proposed placement could work, and that the selection of a Residential School was simply to avoid incarceration and does not seek educational purposes.

Findings of Fact/Conclusions of Law

Pursuant to 23 Ill. Admin. Code 226 Subpart J, the hearing officer must determine if (1) the child has needs which require special education, (2) if the evaluation procedures utilized have been appropriate in nature and degree, (3) if the student's diagnostic profile is substantially verified, (4) if the special education placement and related services are directly related to the student's needs, and (5) if the student' rights have been fully observed.

The issue of D.M.'s need for special education was not in dispute. Parent however challenged whether the evaluation procedures utilized were appropriate in nature and degree, requesting an independent evaluation. The School District's psychologist and educational diagnostician both testified as to the tests they administered and conclusions reached. Additionally, the parent made available to the School District

the independent evaluation of the court appointed psychologist dated 12/2/95, which was one of the finest and most complete such evaluation this Hearing Officer has had the privilege of reviewing. It clarified and reinforced the School's BD disability diagnosis with a clinical diagnosis on AXIS I of: 1) Conduct Disorder, Childhood Onset Type, Severe, and 2) Alcohol Dependence, and 3) Cannabis Dependence. This same psychologist's later addendum of 1/4/96 wherein he acknowledges not knowing of the administration of medications (Cylert and Paxil) at the time of the earlier testings and conclusion, and is used by some as a disclaimer and in support of a diagnosis of ADD or ADHD - in no way can be interpreted that way, nor does it undermine, negate, or lessen the conclusions of the evaluation of 12/21/95. In my opinion, his evaluation is singularly clarifying that a) a Learning Disability diagnosis is ruled out by definition since D.M. has adequate cognition with no serious discrepancy between cognitive and achievement levels., b) earlier reported impulsivity and inattention's may be (indicators) of early onset of his Conduct Disorder, and c) reported "depression" is more likely resultant of the withdrawal from alcohol and cannabis. There is no clinical material nor testing evidence to support the diagnosis of ADD/ADHD. Similarly, the description of "suicidal" is not differentiated situationally (in the detention facility, subsequent to another adolescent-taking his life), thought, gesture or manipulative - but has implications for placement in an open setting.

D.M.'s current lack of internal behavioral controls, delinquent behaviors (open violations of the law), thwarting of authority, recourse to repeated abuses of alcohol and marijuana, lack of remorse for such behavior and compliance only to external controls - all point to and substantiate the diagnosis of Conduct Disorder synonymous with BD/ED in educational terms.

The question of appropriate educational setting was in dispute and central to this hearing. the School District's insistence that their Kankakee Co-Op Day Program, operating from about the hours of 8:00 a.m. to 1:00 p.m., with a Behavior Management Program using Time Outs of 1-5 increasing severity level, would certainly have the ultimate effect of excluding D.M. from school and thereby denying him of a FAPE. We furthermore have the actual experience of a previous period from September to January/February (virtually an entire semester) resulting in only 20 days of attendance, albeit with good behaviors for 19 of them, but earning no credits. The student himself has flatly stated he would not return to school there. We also have evidence that his stay in the juvenile detention center, for the period of 11/7/95 to 1/12/96, produced some problematic behaviors; making it clear that an open setting, like the Day Program could not contain him.

This Hearing Officer is of the opinion that the preponderance of the written evidence and oral testimony makes clear that the unilateral placement of D.M. by his parent in a structured, ISBE approved, private residential school facility is an appropriate educational placement, in the LRE, directly related to the student's needs; and as such is the financial responsibility of the School District.

The Supreme Court has ruled that the parent does not have to go along with what they consider a detrimental school placement, and have the right to unilaterally withdraw a student from what they believe is an inappropriate setting. The two pronged test in the case of "School Committee of the Town of Burlington vs. Department of Education, 105 S.ct. 1996 (1985)" is a) that the School District's (proposed) placement in the Kankakee Co-Op Day Program is inappropriate, and

b) that the unilateral placement at Elan is appropriate. The parent has met both these tests.

The School District's argument that Elan is just another form of incarceration or medical or non-educational and therefore not their responsibility is rejected by this Hearing Officer.

Finally, this Hearing Officer believes, from the evidence in the case record, that the student's/parent's rights have been fully observed.

ORDER

1. School District #307 is ordered to immediately assume financial responsibility for the costs of educating D.M. at Elan School in Poland, Maine, for the period of 1/23/96 (the date he entered private residential placement) to the end of January 1997 (one year plus).

2. The School District is further ordered to assume financial responsibility for the actual cost of D.M.'s initial transportation to Elan School in January 1996 and the cost of his return travel at the end of January 1997.

3. School District #307 shall immediately establish liaison with Elan School for the purpose of jointly drafting a new IEP that acknowledges the BD/ED disability qualifying diagnosis, accepts the reality of Residential Placement as the Least Restrictive Environment, and incorporates Elan educational objectives and goals.

4. The parent's request for an independent evaluation and reimbursement for such a private evaluation is denied, based on it's (sic) being redundant.

5. The district shall submit proof of compliance with this order to the regulatory and Operations Section of the

Illinois State Board of Education, 100 North First Street, Springfield, Illinois 62777 within thirty (30) days from the receipt of this decision.

Appeal Instructions

If either party disagrees with this decision, they may, within thirty (30) days of the receipt of the decision,, appeal to me Illinois State Board of Education, Legal Department, 100 North First Street, Springfield, IL 62777. The appeal may be filed by mail or in person and must include the following:

1. A statement that the appeal of a Level I decision is being requested;

2. a statement setting forth the portions of the Level I decision with which the party disagrees;

3. a statement setting forth the reasons why the decision should be changed;

4. a statement of the relief requested;

5. a statement requesting oral argument, if desired;
NOTE: A new Hearing is not required. A hearing will only be convened if specifically requested by a party and only for the purpose of receiving additional evidence or oral argument.

6. a statement indicating that a copy of the request for the appeal has been served on the other party;

7. the name, address. and telephone number of both parties to the Level I hearing.

Within ten (10) days of filing an appeal, or within ten (10) days

of the receipt of the notice of an appeal, the school district shall transmit to the State Board of Education. Legal Department, in Springfield, a complete administrative record of the hearing, including transcript, records. and reports presented at the hearing, other exhibits and materials presented, and a copy of the Level I decision. The district shall simultaneously send a complete administrative record to the parents.

MILTON NIDETZ M.S.W.
Level I Impartial
Due Process Hearing Officer

/s Milton Nidetz
Signature of Level I Hearing Officer

March 24, 1996
Decision Date

DATE: March 28, 1996

cc: ISBE

APPENDIX F - CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

20 U.S.C. Sec. 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Omitted

(c) Findings

The Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) –

(A) the special educational needs of children with disabilities were not being fully met;

(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school

system and did not go through the educational process with their peers;

(D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

28 USC Sec. 1254(1) Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 USC Sec. 1331 - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

34 C.F.R. Sec. 300.7(a)(1)

Child with a disability.

(a) General.

(1) As used in this part, the term child with a disability means a child evaluated in accordance with Secs. 300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

34 C.F.R. Sec. 300.7(c)(4)

Child with a disability.

(c) Definitions of disability terms. The terms used in this definition are defined as follows:

(4) Emotional disturbance is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships

with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

34 C.F.R. Sec. 300.7(c)(6)

Child with a disability.

Mental retardation means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

34 C.F.R. Sec. 300.7(c)(8)

Child with a disability.

Orthopedic impairment means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused

by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

34 C.F.R. Sec. 300.7(c)(9)

Child with a disability.

Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and

(ii) Adversely affects a child's educational performance.

34 C.F.R. Sec. 300.7(c)(10)

Child with a disability.

Specific learning disability is defined as follows:

(i) General. The term means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) Disorders not included. The term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or

economic disadvantage.

34 C.F.R. Sec. 300.7(c)(12)

Child with a disability.

Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

34 C.F.R. Sec. 300.7(c)(13)

Child with a disability.

Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

34 C.F.R. Sec. 300.26(b)(3)(i) & (ii)

Special Education.

(b) Individual terms defined. The terms in this definition are defined as follows:

(3) Specially-designed instruction means adapting, as appropriate to the needs of an eligible child

under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. Sec. 300.125(a)(1)(i)

Child find.

(a) General requirement.

(1) The State must have in effect policies and procedures to ensure that--

(i) All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated;

34 C.F.R. Sec. 300.300(a)(3)(i) & (ii)

Provision of FAPE.

(a) General. (3):

(i) The services provided to the child under this part address all of the child's identified special education and related services needs described in paragraph (a) of this section.

(ii) The services and placement needed by each child with a disability to receive FAPE must be based on the child's unique needs and not on the child's disability.

34 C.F.R. Sec. 300.302

Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

34 C.F.R. Sec. 300.311

FAPE requirements for students with disabilities in adult prisons.

(a) Exception to FAPE for certain students. Except as provided in Sec. 300.122(a)(2)(ii), the obligation to make FAPE available to all children with disabilities does not apply with respect to students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility--

(1) Were not actually identified as being a child with a disability under Sec. 300.7; and

(2) Did not have an IEP under Part B of the Act.

(b) Requirements that do not apply. The following requirements do not apply to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(1) The requirements contained in Sec. 300.138 and Sec. 300.347(a)(5)(i) (relating to participation of children with disabilities in general assessments).

(2) The requirements in Sec. 300.347(b) (relating to transition planning and transition services), with respect to the students whose eligibility under Part B of the Act will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.

(c) Modifications of IEP or placement.

(1) Subject to paragraph (c)(2) of this section, the IEP team of a student with a disability, who is convicted as an adult under State law and incarcerated in an adult prison, may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(2) The requirements of Secs. 300.340(a) and 300.347(a) relating to IEPs, and 300.550(b) relating to LRE, do not apply